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**PEACETIME REPRISALS UNDER ARTICLE 51:  
AN ARGUMENT FOR LEGAL LEGITIMACY IN CASES OF  
TERRORISM**

A Thesis Presented to  
The Judge Advocate General's School  
United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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April 1997

## THESIS ABSTRACT

This thesis proposes a change to Article 51 of the UN Charter. The use of peacetime reprisals should be afforded the same legal legitimacy under the Charter as are acts characterized as self-defense in situations of terrorism. In support of this proposal, moral grounds for the use of force in reprisals is presented in a historical perspective. Support for the proposition is next demonstrated in the Linear Model which conceptually demonstrates that self-defense and reprisals are actions triggered by the same events and should be treated similarly because they now carry identical multiple intentions. Next is a description of self-defense and the development of method of analysis for reprisals combining several scholarly methods. Following this is an analysis of three recent US actions which were characterized as self-defense under Article 51 but meet also the reprisal criteria a demonstrate the erosion of any difference between the two uses of force.

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*One of the earliest lessons that a student of the law has to learn is to be on his guard when he hears the word reprisal. Deeper hypocrisy and duplicity attach to it than any other term of the art.*<sup>1</sup>

## **I. Introduction**

In 1953 a small Israeli village named Khibye near the Jordanian border and consisting of only civilians suffered an attack by members of the Palestine Liberation Organization (PLO). An Israeli woman and her two small children were killed during the attack. In retaliation, the Israeli Army attacked a Jordanian village near the border and rounded up some of the

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<sup>1</sup> GEOFFREY BEST, WAR AND LAW SINCE 1945 203 (1984). Elaborating on the difference between reprisal and retaliation:

[I]t [reprisal] is the same thing as retaliation, if only because it has a legal basis as one of the few recognized means of enforcement (i.e., my reprisal against your breach of the law makes you return to law abidingness); nor is it the same thing as that wilder motivation, revenge. Because it sounds more respectable to legally motivated ears than retaliation (and, a fortiori, revenge or merely wanton violence) it is the first of the fingers the international lawyer puts in the hole in the dyke when respect for restraint begins to collapse.

inhabitants. Other villagers were still hiding inside their homes when the Israeli's set fire to the village, with the occupants still alive and inside. Jordanian men, women and children perished in the fire and the entire international community condemned Israel for its illegal use of force, a reprisal.<sup>2</sup>

While the right of self-defense against an armed attack is clear, "the use of force in retaliation for past attacks or to deter future attacks has been more controversial."<sup>3</sup> This thesis discusses the state of contemporary international law and the law's foundation in moral theory pertaining to the use of force in actions termed self-defense and those defined as peacetime reprisals. The invocation of self-defense is a legitimate legal action while acts labeled reprisals are illegal under international law.<sup>4</sup> This presumes a distinction between the two principles. This presumption tends to "foreclose systematic comparison between the two concepts."<sup>5</sup>

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<sup>2</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* 216-217 (1977). (noting that while the reprisals employed by Israel do not seem to have deterred or eliminated further attacks by its enemies, there does not seem to be any other possible response to the attacks, aside from appealing to the world for assistance and continuing peace negotiations).

<sup>3</sup> EDWARD LUTTWAK AND DAN HOROWITZ, *THE ISRAELI ARMY* 110 (1975).

<sup>4</sup> William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L. L. 421 (1990).

<sup>5</sup> James Larry Taulbee & John Anderson, *Reprisal Redux*, 16 CASE W. RES. J. INT'L. L. 309, 310 (1984). The authors divide perspectives on self-defense and reprisals into two views. The first view describes the community interest perspective. This is a narrow interpretation of the use of force that attempts to minimize violence on the international level. The good of the international community supersedes the wrong suffered by an individual state. The other view is labeled as the statist perspective. This position takes a more realistic standpoint in advancing broader discretion for individual states.

This thesis proposes a two prong analysis of the use of force when retaliating against terrorist aggression. First, using the linear model self-defense and reprisals is shown to be conceptually the same action. Thus, they deserve similar treatment under international law. The second prong of analysis is a model for analyzing the use of force in retaliation to terrorist attacks. This model incorporates moral and legal justification and shows that recent US actions have blurred distinctions between self-defense and reprisals.<sup>6</sup> The 1986 attack on Libya, and the 1993 and 1996 attacks against Iraq illustrate why retaliatory actions serve both as self-defense in deterrence value and as reprisal in retributive measures. Finally, this work suggests that Article 51 of the United Nations Charter be revised to include the legitimate use of reprisals in the context of terrorist activities.

Theoretically, the main difference between self-defense and reprisal involves the purpose or intent of the action and the response time. Both self-defense and reprisals are systematically similar in that they are both generic methods of self-help. Using the first step of the proposed analysis, arguably they are at the same location on a time continuum and as such, require similar treatment. Viewing both actions in a temporal relationship supports the notion that reprisals do not differ from self-defense in their intent or purpose. By showing that an action can have multiple purposes, arguably the actions can coexist temporally. Thus,

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<sup>6</sup> A. HINDMARSH, *FORCE IN PEACE* 58 (1933) (arguing that reprisals and self-defense can serve the same purpose). They both can serve as actions aimed at deterrence (typical justification for self-defense) and at redress of a legal violation (commonly understood purpose for reprisals).

the "immediate response" requirement of traditional self-defense actions is eliminated and reprisals and self-defense can merge under one form of hybrid self-help. The second prong of analysis shows that the traditional self-defense analysis requiring immediate reaction by a victim state is no longer valid due to changes in the nature of aggression and increase of terrorism.

An examination of the Judeo-Christian moral foundation for the use of reprisal and self-defense is included. A historical understanding of these principles is necessary because important human values are inextricably intertwined with military actions and the military profession. Legal discussions should not hesitate to examine issues in light of moral concepts. When legal theories are translated into lethal actions involving human beings, a legal discussion should be obliged to include the moral consequences in an analysis of the law.

Undeniably, social action is not easily amenable to taxonomic analysis as there are so many variables. However, the time has come to revise the standing legal views on the use of reprisals. State practice and customary law have seen a dramatic shift since the 1986 bombing of Libya. What was once considered illegal, has become repeatedly cloaked under the guise of legitimate international law. Article 51 should be reexamined and reflect customary international law regarding reprisals because states find reprisals to be effective in response to terrorism. The analytical approach suggested here unifies moral and legal



concepts, provides legitimacy to retributive actions by states and allows the US to be a force for good while limiting potential abuses.

## II. Framing the Issues

### *A. Methodology*

This work proposes revising Article 51 to reflect changes in customary international law. Moral and legal authority support the proposition and finally recent factual events serve as historical "evidence".<sup>7</sup> On the deductive level, American military actions demonstrate how the narrow interpretation of Article 51 has eroded and the use of reprisal should now be considered customary international law. On the inductive level, actions of reprisal support customary international law. The central question is whether the recent US attacks are legitimate acts of self-defense under international law or whether Article 51 is being used as an international legal formalism to cover for actions constituting reprisals?

### *B. Defining the Conceptual Problem*

1. *Normative Degeneration of Distinction Between the Theories* - - State A ( $S^A$ ) is engaging in acts that are hostile (they may be actions directing or supporting terrorist activity) against State B ( $S^B$ ). The UN Security Council is incapable of putting a stop to the hostile activity.  $S^B$  acts with armed force with the intent of inflicting damage on the

aggressors and deterring further attacks. Is this action one of self-defense or is it a reprisal? Are the actions of S<sup>A</sup> in retaliation for past actions, thus not in self-defense of new aggressive action by S<sup>B</sup>? Under the strict interpretation of Article 51, this is not legitimate self-defense because a traditional analysis views the aggression by S<sup>A</sup> as already occurred and not preventable. One cannot defend against attacks in the past. Yet, any retaliatory action by S<sup>B</sup> would be to prevent future attacks by S<sup>A</sup>.

In order to be a legitimate self-defense action legitimate under Article 51, the victim state must suffer an actual "armed attack." Past terrorist actions would not qualify as a traditional "armed attack." So, does S<sup>B</sup> act outside the UN Charter, resorting to self-help and engaging in a reprisal or does S<sup>B</sup> characterize its actions as self-defense against possible future aggressive action by S<sup>A</sup>? By viewing events in a temporal sense, arguably there is no distinction between the two theories.

### *C. Framing the Moral Question*

Whether for territorial, ideological or economic reasons, the legitimate right to use force has been a long standing and recognized action that has helped to shape the American national identity. The perspective on national self-defense is shaped by what Americans perceive their nation to be, what values are held dear and what are deemed threats to these

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<sup>7</sup> HUGO GROTIUS, *DE JURE AC PACIS* (1646), (Francis W. Kelsey trans., 1925).

values.<sup>8</sup> The use of force to preserve these values has traditionally been justified using Judeo-Christian moral authority.

Nations seem compelled to legitimize the use of force under international law as well as on a higher plane of morality. The notion of a "just war" or rather the justness of an armed action has been posited by many nations, states and insurgency groups in order to justify their actions. Even the Chinese communist party tried to manipulate just war theory to lend moral legitimacy to its actions.<sup>9</sup> While it may be possible to legitimize virtually any international use of force under the law, it is more difficult to justify the morality of an action under the application of natural law.<sup>10</sup>

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<sup>8</sup> JOHN NORTON MOORE, FREDERICK S. TIPSON & ROBERT F. TURNER, NATIONAL SECURITY LAW, 3 (1990). The relationship between national security and national perceptions is further explained:

[T]he problem of defining national security is a matter of clarifying perceptions of what is to be made secure from whom, and how? What is at stake? How is it threatened? How should it be protected? The answers to these questions are resolved-deliberately or by default- through the political process and are frequently embodied- with varying degrees of clarity and consistency- in the law."

<sup>9</sup> MAO TSE-TUNG, SELECTED WORKS, 199 (1954). "Wars in history can be divided into two kinds, just and unjust. All progressive wars are just and all wars impeding progress are unjust. We Communists are opposed to all unjust wars that impede progress, but we are not opposed to progressive, just wars."

<sup>10</sup> See BARRIE PASKINS & MICHAEL DOCKRILL, THE ETHICS OF WAR 202 (1979) (distinguishing between the legitimization of an action and the justification of one). Legitimacy refers to the legal status of the use of force, which has risen to legally acceptable systematic behavior. Justification is when an action meets moral requirements. Consequently, a use of force for a good purpose could be justifiable, but not legitimate and vice versa.

Natural law is an intrinsic universal standard of right and wrong applied to the way rational beings ought to act, and thus exercise their free wills except in cases where human judgment is perverted.<sup>11</sup> Natural law has been described as the "basis of both international law and the law of the United States, including the law of war and the Code of Military Justice."<sup>12</sup> In order for an action to be legitimate, it must be morally justifiable. A moral issue arises when international law is so vague that it allows a state to legally legitimize any sort of conduct it chooses. The legality of reprisals is justifiable through moral inquiry and requiring moral justification is not setting an aspirational normative standard which cannot be enforced.<sup>13</sup> To prevent political posturing from subsuming any notion of intrinsic right and wrong, the law must remain founded in the established moral traditions.<sup>14</sup> Without moral constructs, international law could quickly sink into legal relativism. This is why this thesis will explore both the law and the philosophical origins of just war theory in western civilization.

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<sup>11</sup> *Id.*

<sup>12</sup> Louis Rene Beres, *The Legal Meaning of Terrorism For The Military Commander*, 11 CONN. J. INT'L L. 1, 20 (1995).

<sup>13</sup> Best, *supra* note 1, at 403. Best confesses that he began his international legal career with the notion that parties intended to adhere to the highest "moral and religious seriousness of the underlying ideas," and that the "idea of restraint in warfare is admirable" and one of civilizations greatest goals. In reality, Best concludes that the "instances of neglect, disregard, carelessness, selectivity, ignorance, misunderstanding, contempt, bad faith, and cynical manipulation abound" have not as of yet made these aspirations possible. *Id.*

<sup>14</sup> Taulbee & Anderson, *supra* note 5, at 318 (citing M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 207 (1961)).

### III. Historical Perspective

#### *A. Catholic Moral Theology as a Basis for International Law*

Most discussions about the restrictions on war or armed aggression are from a strictly legalistic point of view. Restrictions on the use of force in reprisals and self-defense are not arbitrary or for convenience, but rather have a historical and moral basis. The justification for the use of reprisal and self-defense have grounds in theological doctrines, as well as in secular moral reasoning.<sup>15</sup>

Reconciling justifications for war and Catholic moral theology is not mere academic disputation. Catholic teaching and practice have influenced the waging of war for almost two millennia. It has long been acknowledged that all relations between individuals and nations, are based on moral principals.<sup>16</sup> Even though just war theory has become secularized, basic

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<sup>15</sup> Thomas Nagel, *War and Massacre* in WAR AND MORAL RESPONSIBILITY 4-8 (Marshall Cohen, et al. eds., 1974). Nagel divides moral reasoning concerning war and morality into two categories. These are the utilitarian and absolutist. Utilitarianism gives primacy to the concept of what will happen, while absolutism is concerned primarily with what one is doing now. Nagel argues that the conflict occurs because it is rarely the case that one makes choices thinking only of the outcome, rather, there are choices to be made in the executing of the act in order to achieve the outcome. In the utilitarian view, good should be maximized and evil minimized, and the path of the lesser evil should always be followed. Nagel calls this "morally transparent" because a greater good may come out of pursuing the more seemingly reprehensible path. In defending the absolutist position, Nagel advances the view that certain acts cannot be justified, no matter what the ultimate outcome. Among these absolutely unjustifiable acts are the acts of the deliberate murder of those who are harmless.

<sup>16</sup> See David J. Bederman, *Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis*, 10 EMORY INT'L.L. REV. 1, 36 (referring to the writings of Hugo Grotius).

Catholic theology clarifies several points. While moral theology encourages nations to use peaceful diplomatic means with a sense of cooperation rather than resort to violence to settle matters,<sup>17</sup> it does not exclude the use of military means to accomplish a goal.<sup>18</sup> The application of traditional moral theology to international law has been largely ignored by the military legal community. Unfortunately this has led to misleading and faulty conclusions.<sup>19</sup>

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<sup>17</sup> John Paul II, *Centesimus Annus*, 25 and 51-52, AAS 83 (1991) 822-23 and 857-58 (commending nonviolent action as an alternative to warfare).

<sup>18</sup> GERMAIN GRISEZ, *LIVING A CHRISTIAN LIFE* 900 (1993). St. Thomas Aquinas and St. Augustine indicate that that not only can defensive use of force be just, but use of force in reprisal actions can be just if the use is in order to punish those nations violating the law or to bring criminals to justice.

<sup>19</sup> Mary Eileen E. McGrath, *Contemporary International Legal Issues: Nuclear Weapons: The Crisis of Conscience*, 107 MIL. L. REV. 191, 231 (1985). McGrath notes that international law and the law of war are rooted in Catholic moral theology but mistakenly concludes that the 1983 Bishops Pastoral Letter urges military members to adhere to a "new tradition" of nuclear pacifism. McGrath portrays this pacifism as advocating that Roman Catholic military members disobey their commanders and even potentially flee the United States to avoid participating in the use of force. Although the theme of Christian pacifism has resurfaced over the centuries, Christian non-violence does not advocate inaction in the face of injustice or in defense of others. Rather, the role of non-violence and the theory of just war are now being viewed as independent and different views of armed force. *See also* US Catholic Bishops 1983 Pastoral Letter, *The Just War and Non-Violence Positions*, reprinted in *War, MORALITY AND THE MILITARY PROFESSION* 239, (Malham M. Wakin ed., 1986) where the Bishops explain:

[B]oth finds their roots in the Christian theological tradition; each contributes to the full moral vision we need in pursuit of a human peace. We believe the two perspectives support and complement one another, each preserving the other from distortion. Finally, in an age of technological warfare, analysis from the viewpoint of non-violence and analysis from the viewpoint of the just war teaching often converge and agree in their opposition to methods of warfare which are in fact indistinguishable from total warfare.

American foreign policy has understood the just use of force to be force used in self-defense "or in collective defense against an armed attack."<sup>20</sup> The legitimate use of force as an instrument of national policy would seem to require an examination into when and what conditions justify the moral reasons for using armed force. The American popular belief is that war and peace are "diametrically opposed" or at the very least mutually exclusive.<sup>21</sup> Because American popular belief is either peace or war, it remains difficult for this nation to categorize actions like terrorism that do not fit into this model. Americans also have not come to grips with the relation between power and morality. Perhaps this posture is the result of the success of the American constitutional framework. Through the checks and balances of the executive, legislative and judicial branches of the American governmental system, the United States has enjoyed a relative assurance of domestic peace which does not exist on an international level. In international actions, just war theory is relevant because the US relies on it to morally justify the actions discussed in this thesis.

### *B. Just War Theory*

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<sup>20</sup> ROBERT W. TUCKER, *THE JUST WAR* 202 (1960).

<sup>21</sup> James Finn, *Just War and Matters of Statecraft*, 11 Wash. Q. 103 (1988) (citing ROBERT OSGOOD, *LIMITED WAR* 29 (1959)). According to Robert Osgood, more than any great nation, America's basic predisposition's and her experience in world politics encourage the disassociation of power and politics. This disassociation is most marked in America's traditional concept of war and peace as a diametrically opposed states of affairs, to be governed by entirely different rules and considerations without regard for the continuity of political conflict.

The pioneer of the just war theory, St. Ambrose, bishop of Milan (339-97 A.D.) was the first early theologian to recognize the need for a large institution such as the Catholic church to formulate an acceptable doctrine regarding the use of force.<sup>22</sup> St. Ambrose recognized the need to use armed force for a just cause or in self-defense and he emphasized that natural justice (intrinsic good and evil) was binding, even in war.<sup>23</sup>

Later, St. Augustine (354-430 A.D.) formulated the tenets of just war theory.<sup>24</sup> Basically a polemicist, St. Augustine argued that "order is a prerequisite to justice."<sup>25</sup> If societal order

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<sup>22</sup> SYDNEY D. BAILEY, PROHIBITIONS AND RESTRAINTS IN WAR 4-5 (1972) (citing F. HOMES DUDDEN, LIFE AND TIMES OF ST. AMBROSE 497-99 (1935). "For the first time in history, we find a representative of the Church entering the secular arena . . . . Never before had the claims of the Church been asserted in so daring and uncompromising a manner."). See also C.N. COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE 211 (1940). (describing St. Ambrose as being "prepared to use the devil's tools as a means of realizing the kingdom of God.").

<sup>23</sup> *Id.*

<sup>24</sup> See Telford Taylor, *Just and Unjust Wars*, in WAR, MORALITY AND THE MILITARY PROFESSION 228 (Malham M. Wakin ed., 1986), for a good explanation of these concepts:

Just wars, according to Augustine, are usually defined as those that avenge injuries, when a nation or city against which warlike action is to be directed has neglected to punish wrongs committed by its own citizens, and to restore what has been unjustly taken by it. It is the adversary's wickedness which makes the cause just.

See also Bailey, note 22, at 7 (citing St. Augustine, *De Libero Arbitrio* (388) i.5, paras. 11-12; *Contra Faustum Manichaeum* (398) xxi., para. 75-76 in WORKS OF AURELIUS AUGUSTINE 465 (R. Stothert trans., M. Dods ed., 1872) where St. Augustine was described as having an emotional response to a theological challenge: "Like St. Paul and unlike St. Thomas, Augustine wrote only under the pressure of immediate necessity."). St. Augustine's works apparently were quickly written in response to heretical writings which were advocating the Church remain out of secular matters, such as war. St. Augustine believed that ecclesiastical theology had a place in secular politics.



is threatened or injured by a particular action, then the use of force is justified if commanded by lawful authority.<sup>26</sup> This view asserts that there will never be absolute peace among men, but in his pragmatic approach, St. Augustine writes that war's only purpose is to achieve peace.<sup>27</sup>

Systematic thought about the just war concept was refined by St. Thomas Aquinas (1225-1274 A.D.), in the remarkable *Summa Theologia*.<sup>28</sup> St. Thomas built on the work of St. Augustine by expanding the requirements for a moral and just war.<sup>29</sup> In the work of St. Thomas, the moral justification of reprisals and retribution can be found. St. Thomas added

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<sup>25</sup> Bailey, *supra* note 22, at 6.

<sup>26</sup> See *id.* at 6. "I do not approve of killing unless one happens to be a soldier or public functionary . . . [acting] according to the commission lawfully given him, and in the manner becoming his office." (quoting St. Augustine, Letter to Publicola 398 in *De Libero Arbitrio* (388) 44-7, I.5, para. 11 (M. Pontifex trans., 1955)).

<sup>27</sup> St. Augustine, Letter 189 (ET 269; *De Civitate Dei*, xv (420), ch. 4; xix, chs 12 & 18; Letter 220, to Boniface (427) 111 (ET in FC, xxxii 1956).

<sup>28</sup> ST. THOMAS ACQUINAS, *SUMMA THEOLOGICA*, II-II, Q. 40, art. 1 (Fathers of the English Dominican Province trans., 1981).

<sup>29</sup> *Id.* at I-II, Q. 96, art. 2, reply 2. St. Thomas states: In order that a war may be just, three things are necessary: In the first place, the authority of the prince, by whose order the war is undertaken; for it does not belong to a private individual to make war, because, in order to obtain justice he can have recourse to the judgment of his superior . . . But, since the care of the State is confided to princes... it is to them that it belongs to bear the sword in combats for the defense of the State against external enemies . . . In the second place, there must be a just cause; that is to say, those attacked must, by a fault, deserve to be attacked . . . In the third place, it is necessary that the intention of those who fight should be right; that is to say, that they propose to themselves a good to be effected or an evil to be avoided . . . those who wage wars justly have peace as the object of their intention.

culpability of the aggressor to the just war equation.<sup>30</sup> No longer is only the aggressive act considered, but now the evil intent of the aggressor also justifies punishment. Consequently, the just war triad of authority, just cause, and rightful intention was established.

The conduct of the moral and just use of force when responding to an unlawful aggression was refined by St. Thomas in the double effect theory. He argued "[n]othing hinders one act from having two effects, only one of which is intended, while the other is beside the intention."<sup>31</sup> Further, "Double effect provides a moral rational for international law's absolute prohibition on the intentional killing of noncombatants, either as a means to some goal or as an end in itself."<sup>32</sup> The principle of double effect enables the justification of acts which otherwise have evil effects as long as the intent is to achieve morally good consequences.<sup>33</sup> Unquestionably, this doctrine has been abused over the centuries.<sup>34</sup>

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<sup>30</sup> Bailey, *supra* note 22, at 10 (citing to Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT'L L. 669 (1939)):

While to Augustine the injury itself provides the just cause for war, Thomas Aquinas demands some fault on the part of the wrongdoer: his culpability which deserves punishment is the justifying reason for going to war. The just war is primarily in the nature of a punitive action against the wrongdoer for his subjective guilt rather than his objectively wrong act.

<sup>31</sup> See St. Thomas, *supra* note 27, at I-II, Q. 96, art. 2, reply 2.

<sup>32</sup> See George R. Wright, *Noncombatant Immunity: A Case Study in the Relation Between International Law and Morality*, 67 NOTRE DAME L. REV. 335, 340 (1991).

<sup>33</sup> See Charles J. Reid, Jr., *War and Justice*, 34 CATH. U. L. REV. 1173, 1176 (1985) (book review).

This principle undergirds the operation of the *jus in bello* and permits the use of force, even when some evil side effects can be foreseen, as long as several

The rule of double effect is a rule expressing the understanding that in any military operation, it is very likely that innocents<sup>35</sup> will be harmed. The theory reconciles the moral dilemma of the evil of killing innocents. The four components of double effect analysis are: (1) The act is a legally legitimate act of war, or legitimate self-defense; (2) The direct effect is morally acceptable-- incorporating the doctrines of proportionality and discrimination; (3) The intention of the actor is good and any evil results are unintentional; and (4) the good

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conditions are satisfied: (1) the action must carry the intention to produce morally good consequences; (2) the evil effects are not intended as ends in themselves or as means to other ends, good or evil; and (3) the permission of collateral evil must be justified by considerations of proportionate weight.

<sup>34</sup> See Elisabeth Anscombe, *War and Murder*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 292-94 (Malham M. Wakin ed., 1986) (asserting the misuse of the principle of double effect has philosophical roots in the Cartesian psychology in that what becomes crucial to the goodness or evilness of an action is the intent of the actor). Anscombe contrasts the just war teachings to the Pauline teaching which does not allow acts of evil so that good may be the outcome. The counter to this argument is that *jus bellum* and *jus in bello* are not evil. See also Bailey, *supra* note 22 at 13 for another descriptive interpretation of the rule of double effect by Domingo de Soto. de Soto argues there are two consequences [of the rule of double effect] of self-defense, the preservation of one's own life and the destruction of another's, of which the former is intended and the latter is accidental.

<sup>35</sup> See GRISEZ, *supra* note, 18 at 474-75 (1993). The term "innocent" is not referring to those who are free of personal moral guilt, as are babies (because arguably all adults are sinners), but rather the term is used to describe those who are not involved in carrying on an unjust war. "Perhaps the most important of these limits [on just war] is that in war it is necessary to distinguish between those involved in using unjust force (enemy combatants) and the rest of the enemy's community (noncombatants among the enemy's population). In articulating this distinction, innocent was extended to refer to noncombatants." *Id.* Enemy combatants, on the other hand, are not innocents. Professor Grisez describes enemy combatants as threatening just social order and being easily assimilated to criminals because while they may not be morally or legally guilty, they pose a threat similar to that posed by criminals. Hence, killing them is considered justified, and they are not considered "innocent."

outcome justifies the evil effects.<sup>36</sup> For some, the crucial criteria in the double effect analysis is the actors intent. Regardless of whether the rule of double effect is a blanket justification to salve a collective conscience for the killing of innocent people, the concept applies to the methods by which the use of force is employed in self-defense or reprisal actions. There is also a component of double effect analysis in the law of war concepts of proportionality and necessity.

. The Augustinian and Thomistic teachings refined the principles of proportionality and necessity in armed aggression. The principle of proportionality holds that in the justifiable use of force, there are limitations on the amount of force and methods used. The damage to be inflicted must be proportionate to the good expected.<sup>37</sup> This principle imposes limits on the use of force and is incorporated into modern international law.<sup>38</sup>

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<sup>36</sup> KENNETH DOUGHERTY, *GENERAL ETHICS: AN INTRODUCTION TO THE BASIC PRINCIPLES OF THE MORAL LIFE ACCORDING TO ST. THOMAS AQUINAS* 64 (1959).

<sup>37</sup> Judith Gail Gardham, *Proportionality and Force in International Law*, 87 AM. J. INT'L. L. 391 (1993) (describing proportionality as "a fundamental component of the law on the use of force of armed conflict - - the jus ad bellum and jus in bello. In the former it refers to a belligerent's response to a grievance and, in the latter, to the balance to be struck between the achievement of a military goal and the cost in terms of lives."). See also U.N. CHARTER art. 51, para. 5.b. incorporating the rule of proportionality by prohibiting attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete or direct military advantage anticipated."

<sup>38</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12 1977, 1125 U.N.T.S. 3, reprinted in 16 ILM 1391 (1977) [hereinafter Protocol I].

Building on the concepts of proportionality and necessity, the "justness" of war was further examined by two neo-scholastic Spanish theologians Francisco de Vitoria (1480-1546) a Dominican, and Francisco Suarez (1548-1617) a Jesuit. Both theologians focused on the right of self-defense, and it was Suarez's writings about the "triad" of St. Thomas that combined domestic and international legal standards to refine the legal concept of self-defense.<sup>39</sup> These two theologians added to the just war theory the additional requirement that all peaceful means to resolve a conflict must be attempted before resorting to violence.<sup>40</sup> Suarez also expounded on the proportionality concept by requiring its application during all phases of combat.<sup>41</sup>

Just war theory had its place in the Protestant tradition after the Reformation.<sup>42</sup> But interestingly enough, the Dutch Protestant Hugo Grotius (1583-1645), who is frequently

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<sup>39</sup> Taylor, *supra* note 24, at 229. Suarez's concept was that the right of individual and national self-defense was a "natural and necessary one." The situational triad justifying war was defense of life, defense of property and defense of another unjustly attacked.

<sup>40</sup> Bailey, *supra* note 22, at 11 (citing FRANCESCO SUAREZ, *DES INDIS ET DE IURE BELLI REFLECTIONES*, ss. 14, 20-3, 29, & 60 (J.P. Bate ed., 1917), *reprinted in* SCOTT'S CLASSICS OF INTERNATIONAL LAW 171, 173, 175, & 187 (1964)).

<sup>41</sup> FRANCISCO SUAREZ, *DE TRIPLICI VIRTUTE THEOLOGICA: DE CHARITATE*, disputation 13, s. 1 *reprinted in* SELECTIONS FROM THREE WORKS BY SUAREZ 805 (G.L. Williams & A. Brown trans., 1964). Suarez writes, "The method of its [combat] conduct must be proper, and due proportion must be observed at its beginning, during its prosecution and after victory."

<sup>42</sup> Bailey, *supra* note 22, at 18. Both Luther and Calvin deal with just war following the traditional Catholic requirement of governmental authority, just cause and rightful intent. It is in the conduct of war that the Protestant's differ. While Calvin urges mercy by a victor, he does not advocate leniency.

called the father of international law, does not quote from either Calvin or Luther. Rather, he incorporated Roman Catholic theological ideas with international law terms in the "practical application [of] the relations between states"<sup>43</sup> and is heralded as the first to give the world anything like "a regular system of natural jurisprudence."<sup>44</sup> Through his "[c]ompendium of the rules of international law as reflected in actual state conduct," Grotius established the tradition of customary international law by state practice.<sup>45</sup>

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Luther, in a more bloodthirsty vein, writes that it is both 'Christian and an act of love to kill the enemy without hesitation, and to plunder and burn and injure him by every method of warfare until he is conquered.' Almost as an after thought, he adds 'except that one must be aware of sin, and not violate wives and virgins.'

*Id.*

<sup>43</sup> Taylor, *supra* note 24, at 229. Hugo Grotius is credited as the "father of international law" and some scholar's view Grotius as putting into secular legal form much of the just war theory developed by Catholic theologians. "Perhaps because he was a Protestant invoking the individual conscience rather than churchly authority, and wrote as a jurist (his work entitles 'Concerning the Law of War and Peace') rather than a churchman, it is to Grotius that most lawyers refer today when describing the foundations of international law." *Id.* at 229. Even today, it would seem that most lawyers are hesitant to attribute just war concepts to the ecclesiastical minds. See also Mark W. Janis, *Religion and the Literature of International Law: Some Standard Texts*, in THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW 61, 61-66 (Mark W. Janis ed., 1991) (attributing scripture for much of the work by Grotius in *De Jure Belli est Pacis*). See also Bederman, *supra* note 16, at 5 n.10 for additional explanation about the censorship during the 1600's of Catholic theologians by Dutch authorities' refusal to publish any publication referring to Popish or canon law sources. See also Bailey, *supra* note 22, at 1, stating "The doctrine of Just War had its origins in Christian ethics more than 1,000 years before Hugo Grotius began to clothe it in legal forms."

<sup>44</sup> Bederman, *supra* note 16, at 1.

<sup>45</sup> *Id.* at 5. See also Michael Howard, *Temperamenta Belli, Can War Be Controlled?*, in RESTRAINTS ON WAR 4-6 (Michael Howard ed., 1979) (describing the intellectual development of just war theory through the sixteenth century as the ecclesiastical era dominated by clerical apologists who "attempted to accommodate the necessities of warfare to the ethical imperatives of the Christian religion."). Howard then classifies the period

Grotius justified self-defense as a right under natural law.<sup>46</sup> Arguably, he also provides moral ground for reprisals although some scholars have criticized Grotius for not dealing with reprisals more completely.<sup>47</sup> Grotius allows that the just use of force can be for the "enforcement of rights, reparation for injury and to punish the wrong-doer."<sup>48</sup> Additionally, Grotius accepts the Thomistic concept of double effect and incorporates the principles of discrimination and proportionality. While Grotius differs from the Catholic theologians because he emphasizes the "supreme authority of the individual" rather than the authority of the Church, in totality he agrees with St. Augustine and At. Thomas Aquinas in that the intention behind an act is as important as the consequences.<sup>49</sup>

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beginning with Grotius from the seventeenth to the nineteenth century as primarily concerned with the *jus in bello* rather than the *jus ad bellum* (justness of war). He believes that the just war concept has re-emerged in the twentieth century.

<sup>46</sup> Grotius, *supra* note 7, Prolegomena, ch. 2. "The right of self-defense . . . has its origin . . . in the fact that nature commits to each his own protection."

<sup>47</sup> Bailey, *supra* note 22, at 36 (criticizing Grotius for not giving more guidance or insight into the just and appropriate use of reprisal).

Three and a half centuries later, the main thrust of his book is common place among international lawyers. There are, of course, aspects of the work where Grotius has been elaborated or refined or overtaken by events. Perhaps he should have taken a stronger line on looting. Perhaps he should have paid more attention to the problem of reprisals.

<sup>48</sup> Grotius, *supra* note 7, at Prolegomena, para. 25.

<sup>49</sup> Bailey, *supra* note 22, at 34.

After World War II continuing theological reflection by Pope Pius XXII proclaimed that the use of force in justifiable self-defense was morally acceptable.<sup>50</sup> The use of force however, has the caveat that the action must be necessary to "prevent, halt or limit other's unjust use of force."<sup>51</sup> Therefore, the intent of the general strategy and the purpose of the action are critical. The concept of intent is important not only in the justness of the use of force (*jus ad bellum*), but it also is critical in the justifiable methods used in waging that action (*jus in bello*) as demonstrated by the concepts of proportionality and discrimination.<sup>52</sup>

In the 1983 pastoral letter of the US Catholic Bishops, the bishops discuss self-defense and point out that while pacifism is an option for individuals, it is not an option for nations.<sup>53</sup> The Bishops make a distinction between the justness of legitimate self-defense and the resort to violence to achieve subjugation. The letter goes even further in extending the notion of

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<sup>50</sup> Pius XII, Christmas Message 13 (24 Dec. 1948, AAS 41 1949) in *Catholic Mind* 47 (Mar. 1949). In this message the Pope states that defense against illegal aggression can be morally justified. "A people threatened with an unjust aggression, or already its victim, may not remain passively indifferent, if it would think and act as befits Christians." See also Christmas Message 19 (23 Dec. 1956, AAS 49 1957), in *Catholic Mind* 55 (Mar. 1957) where the Pope adds an additional requirement of attempted peaceful resolution by stating "every effort to avoid war being expanded in vain, war- - for effective self-defense and with the hope of a favorable outcome against unjust attack- - could not be considered unlawful."

<sup>51</sup> *Id.*

<sup>52</sup> Reid *supra* note 33, at 1176. Proportionality is restricted in that "The quantity of force employed or threatened must always be morally proportionate to the end being sought in war." Discrimination also contains restrictive elements as "Force must never be applied in such a way as to make noncombatants and innocent persons the intentional objects of attack." *Id.*

<sup>53</sup> U.S. Catholic Bishops, *The Just War and Non-Violence Positions*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 239, 241 (Malham M. Wakin ed., 1986).



self-defense against armed attack and extends the legitimacy of self defense as an acceptable response to aggression against third parties, and even to combat oppression and injustice.<sup>54</sup> Papal encyclicals and other pronouncements from Pius XII to John Paul II state that the right of self-defense is a "natural, perennial right of all states, arising from the need of mankind for political society and the protection of human rights."<sup>55</sup> The Bishops's letter outlines how Catholic theology has always supported strategic deterrence despite its pacifist stance on the use of weapons of mass destruction.<sup>56</sup> The letter also notes that indiscriminate retaliatory action that results in the loss of innocent lives must be condemned because it violates the principle of discrimination.<sup>57</sup>

### *C. Secular Theory*

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<sup>54</sup> *Id.* The Bishops agree that governments must defend their populations when threatened by armed, unjust aggression. *See also* John Paul II, World Day of Peace Message 12: 478 (1982) where the Pope urges self-defense under certain conditions; "This is why Christians, even as they strive to resist and prevent every form of warfare, have no hesitation in recalling that, in the name of an elementary requirement of justice, peoples have a right and even a duty to protect their existence and freedom by proportionate means against an unjust aggressor."

<sup>55</sup> William V. O'Brien, *The Peace Debate and American Catholics*, 5 WASH. Q. 219 (1982).

<sup>56</sup> *Id.* at 219. The Vatican has repeatedly issued statements condemning total war, weapons of mass destruction and nuclear war.

<sup>57</sup> US Catholic Bishops *supra* note 53, at 249.

Under utilitarian theory, obliteration bombing is recognized as deterrence or a deterrent reprisal.<sup>58</sup> One of the criticisms of utilitarianism (known also as radical utilitarianism) is that if the ends justify the means, then it is acceptable that innocent people will be punished in a reprisal because there exists no other effective means to inhibit the criminal behavior of the opponent.<sup>59</sup> It would be impracticable and untrue to say that in war or in the use of military force, innocents shall not be killed or injured in the name of utility (*i.e.*, to shorten a war, to rescue one's own nationals, in defense of others, etc.). But as one scholar has argues, acts of reprisal do not fall into the utilitarian model.<sup>60</sup> Arguably, a morally justifiable act of reprisal is not the *lex talonis* return of evil for evil. In the retaliatory action evil is not being returned. The retaliatory action is only in response to an initial legal violation. Thus, reprisal and self-defense assume the same purpose. Both actions are in response to some sort of provocation, and could be said to depend on the proverbial "They did it first".<sup>61</sup>

#### IV. The Linear Model

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<sup>58</sup> R.B. Brandt, *Utilitarianism and the Rules of War*, in WAR AND MORAL RESPONSIBILITY 29 (Marshall Cohen, et al. eds., 1974) (discussing which of the rules of war are morally justifiable. Utilitarian rules of war are "the ones rational, impartial person would choose (the ones they would be willing to put to themselves under a contract today.))" *Id.*

<sup>59</sup> See WALZER *supra* note 2, at 210 (recognizing that under utilitarian calculations, innocents will be punished in order the stop the opponent. "Hence it is a principle of war law, for every offense punish someone; the guilty, if possible, but someone."). *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

*A. Arguing That Self-Defense and Reprisals Are Conceptually Similar*

In a linear sense, the international law applicable to a particular conflict falls on a spectrum ranging from war to peace. The "level of conflict dictates the nature of the law applicable."<sup>62</sup> Reprisal and self-defense are conceptually similar in that they both prescribe a generic self-help remedy. Self-defense and reprisal are described as separate courses of action because they are seen as existing at separate points on a time sequential continuum. The model presented here suggests they be considered to exist at the same point in time. A longitudinal observational approach is preferable in this case because it allows fluidity in the model adjusting for dynamic variables at different points in time. This type of time series analysis<sup>63</sup> permits an examination of self-defense and reprisal not only in a historical context but as an evolving application.

The commonly accepted legal view of the difference between self-defense and reprisal is one of the intent of the state using force.<sup>64</sup> If the reprisal is for a punitive or retributive

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<sup>62</sup> Richard N. Kiwanuka, *Humanitarian Norms and Internal Strife: Problems and Prospects*, in IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW, 133, 229 (Fritz Kalshoven & Yves Sandoz eds., 1989) (citing Susan L. Turley, *Keeping the Peace: Do the Laws of War Apply*, 73 Tex. L. Rev. 139 (1994)).

<sup>63</sup> See generally C.W. Ostrom, TIME SERIES ANALYSIS: REGRESSION TECHNIQUES (1978) (borrowing a term from advanced quantitative techniques, time series regression analysis is used by historical scholars in order to analyze general trends and interrelations).

<sup>64</sup> Derek Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AM. J. INT'L. L. 1, 3 (1972). Bowett views the distinction between reprisals and self-defense as primarily in the purpose. He explains the prevailing doctrine:

Self-defense is permissible for the purpose of protecting the security of the state and the essential rights - - in particular the rights of territorial integrity and

purpose, it is illegal under the UN Charter. If the intent is one of prevention or deterrence, then it is permissible self-defense and admittedly it is difficult to determine motive or intent.<sup>65</sup> The view suggested in this thesis eliminates the difficulty in attempting to determine a state's intent in the use of force because the recent military actions discussed *infra* serve both deterrent and punitive purposes. Consequently, if reprisal and self-defense coexist contemporaneously, the same legal analysis applies to both actions.

Traditional legal theory describes self-defense and reprisal as occurring at different points in time with different goals.<sup>66</sup> This is shown graphically in the Traditional Model of Self-Defense at Figure 1, Appendix A-1. The model shows that when the victim state ( $S^B$ ) is attacked by the aggressor state ( $S^A$ ), the response by  $S^B$  is characterized as self-defense when it responds immediately and with the intent to deter future aggression by  $S^A$ . Figure 2, Appendix A-2, is the Traditional Reprisal Model. Here, when  $S^B$  is attacked by  $S^A$ , the response by  $S^B$  is not immediate and the intent is for retributive purposes. Figure 3, Appendix A-3, is the Proposed Model for Peacetime Reprisals in Response to Terrorism. Even though there may be a delay in the response of  $S^B$ , the retaliation can serve two purposes, that of deterring future aggression and retribution for past attacks. The lag time in

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political independence- - upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel the delinquent state to abide by the law in the future. But coming after the event and when harm has already been inflicted, reprisals cannot be characterized as a means of protection . . . .

<sup>65</sup> *Id.*

<sup>66</sup> Bowett, *supra* note 64, at 3.

responding may be due to investigations necessary to identify the perpetrator. This model conceptualizes the US actions discussed *infra* and are helpful in understanding dual purpose reprisals.

Self-defense may or may not be in response to an anticipated harm. Reprisals too may or may not be in response to harm already suffered and may be for punitive, retributive or deterrence reasons. The triggering event that is the attack, whether perceived or actually suffered, occurs at the same time. The responsatory action in relation to the aggression is always going to be a retaliation to an unacceptable act or series of actions by S<sup>A</sup>. Self-defense and reprisal coexist contemporaneously because the same acts trigger the retaliation and the retaliation can have several purposes. Article 51 should acknowledge a hybrid retaliatory action consistent with these action/reaction dynamics.

## V. Self-Defense

### *A. Customary Law*

Customary international law has long been a part of law in the United States<sup>67</sup> and US federal courts recognize the incorporation of customary international law into US law.<sup>68</sup>

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<sup>67</sup> U.S. CONST. art. VI.

<sup>68</sup> See *The Paquete Habana*, 175 US 677, 678 (1900). This case involved the US capturing and confiscation of two fishing vessels sailing under the Spanish flag. They were owned by citizens of Cuban and the employees were Cuban but they were Spanish vessels at a time when United States and Spain were at war. The vessels were captured in American

Customary international law acknowledges the need for states to protect not only their geographical and territorial assets, but also extends the right of self-defense to "the violation of any national right."<sup>69</sup> There must be some sort of violation by the offender before the right of self-defense is legitimate. Defining what constitutes a sufficient violation has been a difficult task for international legal scholars<sup>70</sup> but customary international law becomes accepted when states follow a particular practice.<sup>71</sup>

Customary international law recognizes that the right to respond with self-defense is not limited only to when a state has been the victim of an armed aggression. There are other

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waters. The Court gives an incredibly detailed historical rendition of international law governing fishing, beginning in the year 1403. The importance of the case lies in its recognition of international customary law under domestic law.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usage's of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*Id.*

<sup>69</sup> Richard G. Maxon, *Natures Eldest Law: A Survey of a Nation's Right To Act in Self-Defense*, PARAMETERS 55-6 (Autumn 1995).

<sup>70</sup> Alan D. Surchin, Note, *Terror and the Law: The Unilateral Use of Force and the June 1993 Bombing of Baghdad*, 5 DUKE J. COMP. & INT'L. L. 457 (1995).

<sup>71</sup> See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES Sec. 102 cmt. c (1986) [hereinafter RESTATEMENT]. "For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation."

forms of aggression that may rise to the level of offensive attack short of armed aggression. States may legally engage in armed self-defense when "the imminence of attack [is] of such a high degree that a nonviolent resolution of a dispute [is] precluded."<sup>72</sup> Grotius recognized that anticipatory self-defense was an act that depended on the temporal relationship of the anticipated act to the responsive action.<sup>73</sup> The temporal criteria were an enemy posing a "present danger" or threatening behavior that is "imminent in a point in time."<sup>74</sup>

International law does not however, require states to adopt the "wait and take it" attitude before retaliating. Under customary international law, nations may engage in anticipatory self-defense.<sup>75</sup> While certainly the purpose of self-defense is to deter aggression and to promote self-preservation, self-defense is not solely preventive; it is also retributive in nature.<sup>76</sup>

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<sup>72</sup> Maxon, *supra* note 69, at 56 citing Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM.J. INT'L.L. 597-98 (1963).

<sup>73</sup> Louis Renes Beres, *On Assassination as Anticipatory Self-Defense: The Case of Israel*, 20 HOFSTRA L. REV. 321, 322 (1991) (quoting HUGO GROTIUS, II LAW OF WAR AND PEACE 223 (1625)).

<sup>74</sup> *Id.*

<sup>75</sup> *See id.* (citing Statute of the International Court of Justice, July 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, which defines international custom as "evidence of a general practice accepted as law.").

<sup>76</sup> Maxon, *supra* note 69, at 56.

1. *Temporal Existence With Reprisal* - -Like the principle of reprisal, the theory of self-defense is also a "backward-looking" proposition.<sup>77</sup> An act of self-defense is temporally dependent on some sort of aggressive action already initiated or some legal violation by the aggressor. Arguably, the difference between self-defense and retribution is that "self-defense cannot be invoked in response to an attack that is over."<sup>78</sup> Yet, this is precisely what is occurring. Any invocation of self-defense or anticipatory self-defense is a responsatorial action to an already initiated aggressive action. Additionally, both reprisal and self-defense are forward looking in that they both seek to deter future harm.

2. *The Caroline Case - Accepted Definition of Self-Defense* - -The Caroline case provides a widely accepted definition of self-defense criteria under customary international law. During the 1837 revolt against the British in Canada, an American ship named the Caroline sailed into Canadian waters providing supplies and support to the rebels in Canada. Although the United States asserted its neutrality the British entered American territory and destroyed the ship, killing two American citizens.<sup>79</sup> Secretary of State Daniel Webster pronounced what has become the classic requirement of immediacy in actions termed self-defense. He stated that "there must be a necessity of self-defense, instant, overwhelming,

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<sup>77</sup> Richard Wasserman, *On the Morality of War*, in *WAR, MORALITY AND THE MILITARY PROFESSION* 327 (Malham M. Wakin, ed. 1986).

<sup>78</sup> *Id.*

<sup>79</sup> Maxon, *supra* note 69 at 57 (citing D.P.O'CONNELL, *INTERNATIONAL LAW* 339 (1965)).



leaving no choice of means and no moment for deliberation.”<sup>80</sup> Secretary Webster then urged that action should be “nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it.”<sup>81</sup>

Though widely touted as “Webster’s Caroline Criteria” defining self-defense, these criteria are a reiteration of the Catholic moral principles of proportionality and discrimination.<sup>82</sup>

The Caroline case represents the idea that a victim state may rightfully invade and respond with force against an aggressor state while the territorial integrity of the aggressor state gives way to the right of self-defense.<sup>83</sup>

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<sup>80</sup> *Id.* (citing OPPENHEIM’S INTERNATIONAL LAW 420 (Robert Jennings & Arthur Watts, eds., (9th ed.1993)).

<sup>81</sup> *Id.*

<sup>82</sup> See Robert S. Johnson, Jr., *The Raid on Tunisia - Was The Condemnation of Israel Justified?* 7 (1986), (unpublished LLM thesis, The Judge Advocate General’s School) (on file with The Judge Advocate General’s School Library). Frequently concepts originating in Catholic moral theology are attributed to contemporary secular legalists. Here, the author mistakenly credits former Secretary of State Daniel Webster with establishing the principals of proportionality and necessity.

<sup>83</sup> Guy Roberts, *Self-Help in Combating State Sponsored Terrorism: Self Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT’L. L. 243, 269 (1987) (citing M.GARCIA-MORA, *INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES* 32 (1962)). Garcia-Mora asserts that the right of territorial integrity is not absolute. When a state allows terrorist activity to be based in its territory or is sponsoring such activity, the victims right to self-defense outweighs the territorial rights. If a state continues to sponsor terrorist activities then that states “right of territorial integrity must yield to the right of self-defense of the states against whom the bands [of terrorists] are directing their activities. Implicit in this assertion is the recognition that the right of territorial integrity is by no means absolute but must give way to the apparently stronger right of self-defense of the threatened community.” *Id.*

Based on the Caroline case, four criteria evolved for the use of force in self-defense.<sup>84</sup>

These are (1) an infringement or threatened infringement of the territorial integrity or political independence of the defending state; (2) the failure or inability of the other state to prevent the infringement; (3) the absence of alternative means to secure protection; and (4) the strict limitation of the defending state's use of force to prevent danger.<sup>85</sup>

Under this analysis, a state unable to control its territory loses full respect of that territory. Self-defense is justifiable against terrorists operating out of another state that is "either unwilling or unable to prevent the acts."<sup>86</sup> The loss of territorial integrity is acceptable because the host state has is not fulfilling the obligation to control it's own borders.<sup>87</sup> While

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<sup>84</sup> See *id* (citing Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 ACAD. DE DROIT INT'L RECUEIL DES COURS 455, 463-64 (1952).

<sup>85</sup> See also D. BOWETT, *SELF-DEFENSE OF INTERNATIONAL LAW* 185-86 (1958).

<sup>86</sup> See Roberts, *supra* note 83, at 269. Another issue which must be carefully considered by the victim state is the level of complicity on the part of the aggressor state. In 1912 the United States crossed the border into Mexico in pursuit of armed bands of Mexicans who were committing crimes in the US. The US issued a statement recognizing that Mexico was not sponsoring this activity but was nonetheless powerless to stop the criminals. "[Under] no circumstances will [US troops] be suffered to trench in any degree upon the sovereignty of Mexico or develop into intervention of any kind in the internal affairs of our sister republic." See also Letter from the American Secretary of State to a representative of the Mexican Government of March 13, 1916 reprinted in II G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 289, 292 (1949).

<sup>87</sup> *Id.* at 270 (citing I. HYDE, *INTERNATIONAL LAW* 110-114 (1922):

The reasonableness of the claim of a state that respect be paid to its supremacy within its domain, as well as to its political independence, depends upon its success in satisfying the full measure of its obligation growing out of activities within its territory which are productive of a direct effect upon foreign states and their nationals.

customary law allows states to engage in the reasonable use of force in self-defense, treaty law and Article 51 of the UN Charter have attempted to codify this use.

### *B. Treaty Law*

1. *The Kellogg-Briand Pact* - -After World War I, the League of Nations was established to promote relations and international law among nations.<sup>88</sup> Prior to World War II, the League of Nations drafted the Kellogg-Briand Pact that was ultimately signed by thirty-six nations.<sup>89</sup> As in the United Nations Charter, the authors were attempting to outlaw war and require nations to settle disputes by peaceful means.<sup>90</sup>

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<sup>88</sup> JAMES AVERY JOYCE, *BROKEN STAR: THE STORY OF THE LEAGUE OF NATIONS* (1919-1939) 124 (1978).

<sup>89</sup> More accurately, the General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact] although it was commonly known as the "Pact of Paris."

<sup>90</sup> The signatories to the Pact renounced war as an instrument of national policy and Article 2 required all disputes to be settled "by pacific means." The UN Charter later attempted to do exactly the same thing, with much the same luck as the Kellogg-Briand Pact. The two substantive articles of the Pact were :

Article 1: The High Contracting Parties solemnly declare that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

Article 2. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts, of whatever nature or whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

2. *Self-Defense and the UN Charter* - -The destruction of World War II led the global community to conclude that it was again time to make an attempt "to maintain international peace and security."<sup>91</sup> Like the Kellogg-Briand Pact, it was another attempt to make war and armed aggression illegal.<sup>92</sup> The allies formed the United Nations and after much debate, fifty member nations adopted the United Nations Charter on October 24, 1945.<sup>93</sup> Article 51 falls under Chapter VII of the Charter and deals with threats to peace and acts of aggression.<sup>94</sup> The Charter has been sharply criticized as a failure by American scholars.<sup>95</sup>

The disagreements and ideological competition between the United States and the former Soviet Union, the divisions between the have and have not nations, religious differences and uneven development of military strength have all contributed to make the UN Charter

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<sup>91</sup> UN CHARTER art. 1, para.1.

<sup>92</sup> UN CHARTER art. 1-2.

<sup>93</sup> AMOS YODER, *THE EVOLUTION OF THE UNITED NATIONS SYSTEM* 26-27 (1977) (discussing the debates during the formation of the United Nations). *See generally* RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* (1958). In an international attempt at harmony, one of the first acts of the UN General Assembly was to enact the "Nuremberg Principles" which were trying to outlaw war. The name "Nuremberg Principles" came from the International Tribunal in Nuremberg, Germany which was in the process of trying the leaders of Nazi Germany for their war crimes, war against peace, and crimes against humanity. *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat.1544, 82 U.N.T.S. 279, rectified by Protocol of Oct. 6, 1945, 59 Stat. 1586, 3 Bevans 1286.

<sup>94</sup> *See supra* note 92.

<sup>95</sup> W. MICHAEL REISMAN, *ALLOCATING COMPETENCES TO USE COERCION IN THE POST-COLD WAR WORLD: PRACTICES, CONDITIONS AND PROSPECTS IN LAW AND FORCE* 27 (1991). (opining that the United Nations does not possess the economic or political clout to enforce its mandates and will most likely never achieve enforcement capabilities).

unworkable in the area of self-defense and reprisal.<sup>96</sup> Hence, in many instances the nations that use force have shaped their justifications to fit within the UN Charter's allowable self-defense criteria. "Even actions traditionally and unquestionably characterized as reprisals or self-help were recast in the mold of self-defense. One of the consequences of this trend has been to render the purported restrictiveness of the doctrine of self-defense more and more elastic."<sup>97</sup>

However ideological naive, the intent of the Charter was to establish a centralized body (the Security Council) that would deal with the unauthorized use of force and would have the military assets to enforce those decisions. Article 2(4) prohibits the use of unilateral force reinforcing the notion that the right to protect oneself is unnecessary because the Security Council would respond to threats of international peace and security. The Charter permits self-help or self-defense only in response to an act of aggression. The problem is, there is no definition of aggression.<sup>98</sup>

In an attempt to define a level of aggression justifying the use of self-defense, the following criteria were suggested: (1) the nature of the coercion; (2) the aggressor states size and power; (3) the nature of the aggressor states objectives, and; (4) the consequences if those

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 28.

<sup>98</sup> *Id.* at 30.

objectives are achieved.<sup>99</sup> These criteria are no longer totally applicable in today's global context. When terrorists are the aggressors, the size and power of the group is irrelevant because they are operating outside of national boundaries except for any logistical support they are receiving from a host state.

*a. Proportionality* - This concept is a consideration used to determine the appropriate level of force in response to aggression. Some have advanced the theory that the proportionality of a response should equal the goal of preserving the status quo requiring military action to cease once the danger has been eliminated.<sup>100</sup> This is contradictory because the preservation of the status quo would appear precisely not to be the goal. Presumably the status quo became unacceptable resulting in the need to resort to self-defense in the first place. Although the language of Article 51 does not refer to proportionality when engaging in self-defense, it is an accepted principle that an act of self-defense must not exceed the level of force used by the aggressor.<sup>101</sup> The Security Council construes the proportionality of response very strictly when evaluating the legitimacy of a retaliatory action.<sup>102</sup>

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<sup>99</sup> Maxon, *supra* note 69, at 57 (citing Uri Homan, *The Israeli Aerial Raid Upon the Iraqi Nuclear Reactor and the Right of Self-Defense*, 109 M.L. LAW REV. 193 (1985)).

<sup>100</sup> *Id.* at 57.

<sup>101</sup> O. Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 120-21 (1986).

<sup>102</sup> *Id.*

*b. Immediate Response* - -The requirement of immediate response poses a particular problem when terrorist acts require an investigation into the identity of the perpetrators and their international support. Since 1953, the UN Security Council has consistently condemned retaliatory actions by Israel against the Palestine Liberation Army and other terrorist groups acting within Israel's borders because the responses have not always been immediate.<sup>103</sup> The Security Council characterizes many of Israel's retaliatory actions as illegal reprisals rather than self-defense because they did not meet the immediacy requirement. The Council still cites to the Webster Caroline Criteria requiring immediate response.<sup>104</sup>

*c. Suggestions* - -The Security Council should amend its practice to allow application of two interpretations of international law.<sup>105</sup> The Security Council should recognize that there are such actions as "on-the-spot self-defense reactions, and defensive reprisals at a time and a place different from those of the original attack."<sup>106</sup> This suggestion would expand self-defense in the context of Security Council resolutions but does not resolve the problem of legality under international law. A revision of Article 51 is the strongest way to eliminate the rigid immediacy element still required in a Security Council evaluation of actions termed self-defense.

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<sup>103</sup> O'Brien, *supra* note 4, at 471.

<sup>104</sup> *Id.* at 476-77 (opining that the concept of immediate response is irrelevant in a situations where there is a continuing pattern of hostilities).

<sup>105</sup> *Id.* at 476.

<sup>106</sup> *Id.*

d. *Article 51* - Article 51 restricts the legitimate use of force to self-defense and collective security. At the time of conception, these restrictions enjoyed large support from the international community. In practice they have not proven realistic because they presupposed a sense of global community that has not materialized. In the almost fifty years since the creation of the United Nations, there have been so many instances beyond these two allowable uses of force, that scholars question their value.<sup>107</sup> Thus, in many instances the nations using force have shaped their justifications to fit within the Charters allowable self-defense criteria. "Even actions traditionally and unquestionably characterized as reprisals or self-help were recast in the mold of self-defense. A consequence of this trend has been to render the purported restrictiveness of the doctrine of self-defense more and more elastic."<sup>108</sup>

Article 51 of the UN Charter states:

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<sup>107</sup> Best, *supra* note 1, at 392. The author states:

International law is a body of law characteristic of an undeveloped legal community, lacking a central power which is able to enforce the law . . . . Another feature of its underdevelopment is the absence of a central court, which can decide upon conflicts concerning the interpretation of the law. Because such a court with compulsory powers does not exist, international law is compelled to recognize the right of each party to interpret the law as it chooses. States, and other subjects of international law, are bound by international law, but their right of autointerpretation of that law is also recognized . . . It is in connection with the laws of war that the impossibility of enforcing the law is most striking. The lack of central authoritative power leaves the enforcement to the parties themselves.

<sup>108</sup> *Id.* at 28.



Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>109</sup>

Article 2(4) of the Charter prohibits the use of armed force by nations except for the rights set forth in Article 51.<sup>110</sup> One explanation for Article 51 is that it was to "provide for the use of regional arrangements and agencies for collective self-defense without requiring approval of the Security Council."<sup>111</sup> Accordingly, Article 51 became a compromise allowing regional alliances in collective self-defense actions while retaining the integrity of the Security Council. The term "collective self-defense" was the result of this compromise. This term has come to mean more than just a regional grouping together of nations. It has come to mean unilateral action by a state against an aggressor state even on behalf of other states.

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<sup>109</sup> UN CHARTER *supra* note 91.

<sup>110</sup> UN CHARTER art.2, para. 4. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

<sup>111</sup> Mark B. Baker, *Terrorism and the Inherent Right of Self-Defense (A Call to Amend Article 51 of the United Nations Charter)*, 10 Hous. J. INT'L. L. 25, 30 (1987) (citing WEILER & SIMONS, *THE US AND THE UN: THE SEARCH FOR INTERNATIONAL PEACE AND SECURITY* 80 (1967)). According to these scholars, the Latin American countries wanted to retain regional coalitions that were already in place at the time of the drafting of Article 51. These countries wanted regional freedom to act in the event of an attack from other Latin American states in other coalitions.

e. *State Practice Supports the Inherent Right to Self-Defense* - Article 51 calls the right to self-defense "inherent." This term implies that the right to self-defense existed prior to and independent of the Charter.<sup>112</sup> This supports the argument that state practice actually dictates the terms for the use of force. This is an important point because it supports this thesis's contention that recent US military actions, along with international acquiescence, have expanded the purpose of the use of force. The 1986, 1993 and 1996 air strikes discussed *infra* demonstrate how actions characterized as self-defense also qualify as reprisals. Consequently, these actions set precedence for revision of the law on reprisals.

The use of the term "force" was a deliberate choice as at the time of the provision's drafting. The drafters recognized that many states were engaging in uses of force without declaring it war.<sup>113</sup> While the term "force" may mean many types of coercion, (including informational, psychological, ideological, economical and physical coercion), article 2(4) really concerns the use of physical armed force.<sup>114</sup> Consequently, the doctrine of self-defense under Article 51 has evolved to allow a state to use armed force only in response to an "armed attack" or in some cases the threat of armed attack.

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<sup>112</sup> *Id.* at 31 (arguing that the inherent right to self-defense exists mainly in the realm of customary international law, rather than in the limited rights addressed by the Charter).

<sup>113</sup> Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH L. REV. 1620, 1623 (1984) (noting that the term "war" had been used in the League of Nations Covenant and in the Kellogg-Briand Pact of 1928, but fell into disfavor in the 1930's).

<sup>114</sup> *Id.*

The drafters of the Charter probably chose the term "attack" over the word aggression deliberately in order to give the Security Council the opportunity to define what constituted unlawful aggression. This term has since evolved from meaning a direct aggression using conventional forms of warfare as in World War II into a type of aggression more difficult to define. These new forms are called "low intensity conflicts" or "operations other than war" and terrorist acts may fall into such categories. These recent forms of aggression are creatively described as states of "violent peace" or "secret warfare."<sup>115</sup> Acts of terrorism pose a particularly difficult problem in the context of reprisals because it may at times be difficult to determine when a terrorist act or threat becomes a triggering event justifying a response.

### *C. Defining Terrorism Under International Law*

It may be difficult to define what constitutes a terrorist act. It has been proposed that the definition of terrorism should include "guerrilla warfare, or 'irregular' warfare against

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<sup>115</sup> Stuart G. Baker, *Comparing the 1993 US Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99,107 (1994) (citing an overview of recent low-intensity warfare by Alberto R. Coll, *International Law and US Foreign Policy: Present Challenges and Opportunities*, WASH. Q., 107, 111 (Autumn 1988). "Professor Coll defines violent peace as a state of affairs in which a wide spectrum of unconventional and highly creative modes of violence, best summed under the term 'secret warfare' are used against an adversary, while maintaining the pretense that no open war is occurring." *Id.* This secret warfare includes all types of terrorism, assassination and state funded terrorism.

military targets, and criminal attacks on noncombatant urban populations.”<sup>116</sup> It has also been suggested that guerrilla warfare and terrorism are not always synonymous, the former being more analogous to ordinary criminal acts when in initial stages.<sup>117</sup> Acts of terrorism are blatantly immoral acts because they violate any notion of discrimination.<sup>118</sup> Terrorists commonly engage in acts that are considered illegal even in time of war.<sup>119</sup>

A difficult and relative determination must be made as to what actions cross the threshold warranting a forceful reaction. This is most difficult when dealing with terrorist threats. It has been suggested that the focus should be on the targets.<sup>120</sup> Using the *jus in bello* concepts,

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<sup>116</sup> Beres, *supra* note 12, at 2 (noting that “The US Joint Chiefs of Staff include terrorism and insurgent war in their definition of LIC.”) (citing Heinz Vetschera, *Low Intensity Conflict: Theory and Concept*, in 3 INTERNATIONAL MILITARY AND DEFENSE ENCYCLOPEDIA 1578, 1578-79 (Trevor N. Dupuy et al. eds., 1993)).

<sup>117</sup> Reid, *supra* note 33, at 1184-85 (noting an interesting argument for treating guerrilla insurgency differently from terrorism). Guerrilla actions follow a pattern in three stages. First, they engage in violent acts, then they build a political infrastructure challenging the existing government and third, they openly confront existing government forces. The author recognizes that legitimate guerrilla insurgents may cross the line and engage in immoral and illegal tactics, such as using noncombatants as shields.

<sup>118</sup> *Id.* at 1183 (quoting George Habbash, *TIME*, April 1970, at 32, head of the Popular Front for the Liberation of Palestine (PFLP) as saying “In the age of the revolution of the peoples oppressed by the world imperialist system there can be no geographical or political boundaries or moral limits to the operations of the people’s camp. In today’s world, no one is ‘innocent,’ and no one is neutral.”).

<sup>119</sup> Burton M. Leiser, *Enemies of Mankind*, in *TERRORISM: HOW THE WEST CAN WIN* 155 (1986). Terrorism is described as “designed to create an atmosphere of despair or fear, and shake the faith of citizens in their government. Terrorists carry out arbitrary and selective murder, kidnapping, assassination, robbery and bombings. They do so with total indifference to legal and moral norms while claiming special exemption from these norms.”

<sup>120</sup> Beres, *supra* note 12, at 11.

actions that target non-combatants would "ipso facto, be expressions of terrorism. Of course, such threats would also have to be embedded in political demands, otherwise they would merely represent 'ordinary' forms of criminality."<sup>121</sup> Another way to analyze threat levels is to "focus on the degree of anticipated harm" where categorization of either "terrorist" or merely "criminal" would depend on the degree of violence or destructiveness anticipated.

In 1972 the United Nations attempted to deal with the issues of terrorism in the Draft Convention of Terrorism but it went down to defeat by the Arab, Communist Asian and African veto.<sup>122</sup> It has since been suggested that all current definitions of terrorism are vague or overbroad.<sup>123</sup> It is now recognized that there is no one international definition of terrorism.<sup>124</sup> It is termed a "conglomerate crime" because it is defined under so many different sources of international law.<sup>125</sup> The US Army has a well articulated approach

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<sup>121</sup> *See id.*

<sup>122</sup> Baker, *supra* note 111, at 25 (citing American Draft Convention on Terrorism, 67 DEP'T. ST. BULL. 431 (1972))

<sup>123</sup> Beres, *supra* note 12, at 2. Professor Beres suggests that any treatment of terrorism must "address five key issues: Which law (national or international) applies; whether the "terrorist" activity meets the requirements of "just cause" and "just means"; whether the terrorist threats meet necessary threshold levels; whether the "terrorist group meets the "insurgent organization" requirement; and whether the terrorist activity results in "political violence". Professor Beres notes the importance of Natural law in defining terrorism.

<sup>124</sup> *See id.* at 5.

<sup>125</sup> Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted Dec 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the

already in place dealing with terrorism which separates combating terrorism into two philosophically different components.<sup>126</sup>

The Comprehensive Terrorism Prevention Act of 1995 passed by the 104th Congress expanded the definition of terrorism and it is worthy to note that it does not include a political aspect to the definition.<sup>127</sup> Secretary of State Christopher defined terrorism as undermining society's interests, and set the stage for invoking Article 51 by calling terrorism anywhere as any "threat to our national interests."<sup>128</sup>

#### *D. Interpreting Article 51*

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Suppression of Unlawful Seizure of Aircraft, Dec 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105.

<sup>126</sup> DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, (14 June 1993) [hereinafter FM 100-5] 13-17. The Department of State is given the lead role in combating terrorism abroad with the Department of Defense fulfilling a supporting role. FM 100-5 divides measures into anti-terrorism and counter-terrorism. Anti-terrorism are "those passive measures taken to minimize vulnerability to terrorism." Counterterrorism are the offensive measures "taken to prevent, deter, and respond to terrorism." *Id.*

<sup>127</sup> Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., 1st Sess. (1995) [hereinafter Terrorism Prevention Act] does not define an act of terrorism to include political motives. "The use of any explosive, firearm, or other weapon (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." This widened definition would include acts that were previously considered to be just criminal in nature.

<sup>128</sup> US STATE DEPT STATE DISPATCH, June 3, 1996, *Fighting Terrorism: Challenges for Peacemakers*, Secretary William Christopher, Address to the Washington Institute for Near East Policy Annual Symposium, Wash. DC May 21, 1996.

1. *The Restrictive View* - -There has been a call for an "expanded interpretation of the Article 51 right to self defense."<sup>129</sup> Two opposing views have developed regarding the definition of armed aggression as an integral part of Article 51.<sup>130</sup> The restrictive definition of armed attack is probably truer to the intentions of Article 2(4), in that it contemplates the literal use of large conventional forces forcing states to resist anticipatory self-defense or retaliation until after the attack or triggering event of aggression. Under this view, any resort

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<sup>129</sup> Don Wallace, Jr., *International Law and the Use of Force: Reflections on the Need for Reform*, 19 INT'L. LAW 259 (1985). The following proposed rules advocate lowering threat thresholds:

I suggest three rules: (1) an expanded interpretation of the Article 51 right to self-defense; (2) enunciation of a new concept of regionalism; and (3) a statement with respect to the nuclear and strategic balance between the United States and the Soviet Union, in such a way as to contain realistically the operation of the balance of power . . . . Article 51 should be expanded, to be sure cautiously, to permit individual and collective self-defense not only against armed attack but also against internal subversion supported from the outside by force. This is to say, one would slightly lower the threshold of offensive action that would justify self-defense under Article 51. This would be no more than an intelligent declaration of state practice as it has developed since World War II.

Wallace is really focusing on the expansion of Article 51 to allow external support for internal rebellions. Interestingly, Wallace does not call for the expanded Article 51 to encompass "humanitarian intervention". "State intervention, by force, to assist the Cambodians in Kampuchea, or in the 1930's for the victims of Nazi Germany, would remain illegal, as would such intervention to assist the victims of apartheid in South Africa, although apartheid has been condemned by the General Assembly as a threat to international peace and security." *Id.* Wallace justifies this position under Article 2(4) which prohibits the use of force in international relations. Wallace states "Moreover, it is obvious that Article 2(4), indeed, the entire United Nations system, enshrines the nation-state system in which one state is not to use force against another, no matter how distasteful its internal conditions." *Id.*

<sup>130</sup> Baker, *supra* note 115, at 108-9 (citing Norman Menachem Feder, *Note, Reading the UN Charter Connotatively; Toward a New Definition of Armed Attack*, 19 N.Y.U. J. INT'L L. & POL. 395, 403 (1987)). The restrictive view maintains a very narrow and literal meaning of "armed attack" that includes instruments of war. This interpretation "places undue constraints on a states ability to respond legitimately to international aggression." *Id.*

to the use of force by a UN member short of self-defense of an armed attack or collective action pursuant to a Security Council decision is illegal.<sup>131</sup> The UN has tried to advance this position by refusing to recognize anticipatory self-defense.<sup>132</sup>

2. *Why The Restrictive View has Failed* - - The restrictivist interpretation of Article 51 was the dominant view of the UN Security Council, led by the former Soviet Union's narrow construction.<sup>133</sup> With the demise of the Soviet Union and its satellite states, support for this interpretation has eroded. The restrictive view of Article 51 has failed for other reasons. It has failed because of the increased use of terrorism as a foreign policy tool.<sup>134</sup> Terrorist's

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<sup>131</sup> Roberts, *supra* note 83, at 272 (citing J. STONE, *AGGRESSION AND WORLD ORDER* 94-95 (1958)). Extended to its extreme logic, under this theory a state would literally have to endure any type of harm short of armed attack for an indefinite period of time.

<sup>132</sup> *Id.* See also R. Henkin, *Force, Intervention and Neutrality in Contemporary International Law*, 57 AM. SOC'Y INT'L. L. PROC. 147, 166 (1963). Professor Henkin argues the restrictive position:

The reasons why these provisions, as interpreted, were made the heart of the Charter are not a mystery. The nations coming out of a second World War concluded that, despite inadequacies in international law and order, force was no longer tolerable; injustice would have to be dealt with, changes would have to be achieved, by other means. An exception to the ban on force, to permit self-help in the case of armed attack, was inevitable and just . . . . But the exception was deliberately made clear and narrow. Armed attack is an objective fact, comparatively easy to prove, difficult to fabricate . . . . Exceptions beyond that, however, would tend to destroy the rule. Even an extension to "anticipatory self-defense" would open the floodgates to fabrication . . . . to paranoia . . . . to confusion of aggressor and victim in every situation of tension in a conflict-ridden world.

<sup>133</sup> Baker, *supra* note 115, at 109.

<sup>134</sup> Roberts, *supra* note 83, at 273 (citing Falk, *The Beirut Raid and the International Law of Retaliations*, 63 AM. J. INT'L. L. 415, 426 (1969)).



access to more destructive and violent methods of attack and improvements in information dissemination now make it possible for terrorists to call instant media attention to their cause. States subject to these attacks have few options. They can respond by directly attacking the terrorist organization, if it can be located, or the victim state can respond against the terrorist host nation. The victim states risks condemnation for violating the principal of proportionality by making a disproportionate response.<sup>135</sup>

The restrictivist view has also failed because of the previously mentioned lack of definition of "armed aggression." It is technologically possible to threaten a state without direct armed attacks.<sup>136</sup> The grounds for self-defense have been broken into four basic components; (a) the right of territorial integrity; (b) the right of political independence; (c) the right of protection over nationals, and; (d) certain economic rights.<sup>137</sup> Any one of these rights may be imposed upon by acts which would not fall within the traditional notion of "armed attack." An embargo, a boycott, deliberately causing global market irregularities or

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 273 (citing M. McDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 240-1 (1961)). The following argues for the expansion of Article 51's use of force requirement applicable in the case of terrorism:

To say that Article 51 limits the appropriate precipitating event for lawful self-defense to an 'armed attack' is in effect to suppose that in no possible context can applications of non-military types of coercion take on efficacy, intensity, and proportions comparable to those of an 'armed attack' and thus present an analogous condition of necessity.

<sup>137</sup> See BOWETT, *supra* note, 85 at 185-6.

developing unauthorized nuclear or chemical/biological plants would qualify as armed aggression. Arguably, an assassination attempt against a former US President may fall under one of these categories.

The restrictionist view also prohibits states from using self-help and leaves them without a remedy in the face of potential grave harm. There is no remedy because the Security Council has no means by which to enforce any of its proclamations. "Article 51 envisions self-defense as an interim right, to be exercised only until the Security Council assumes responsibility for resolving the dispute and restoring peace."<sup>138</sup> This vision of the Security Council's role has not proven viable because the Security Council has independent means by which to enforce its decisions.

3. *The Expansivist View* - Under the expansivist view of Article 51, self-defense against terrorist attacks is justifiable. The inherent right of self-defense under Article 51 has not been impaired by its vague language. Rather, what constitutes an "armed attack" has deliberately been left to the discretion of the states exercising their right to individual or collective self-defense.<sup>139</sup> Under customary international law, preparation or imminent attack triggers the right of self-defense. Sir Waldock argues that the triggering event justifying the right to act in self-defense can be while an attack is being prepared. He describes this situation as an

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<sup>138</sup> Roberts, *supra* note 83, at 273. Professor Roberts call the prohibition on the use of force "ludicrous and chimerical."

<sup>139</sup> *Id.* at 275.

armed attack already under way even though it has not yet "crossed the frontier."<sup>140</sup> Sir Waldock recognizes that in a temporal sense, the triggering event that gives rise to the reaction using force can be a perception of danger. This view demonstrates an understanding that while anticipatory self-defense may initially appear to be an action before aggression has taken place, in fact aggression has already taken place. This can be in the form of a build-up of arms or any other type of threatening action by the aggressor state. Therefore, preemptory strikes as self-defense are acceptable under customary international law. This thesis submits that the right of reprisal is a preemptory norm or *jus cogens* norm, the same as self-defense, in that it can be triggered by the same actions and serves the same purpose as self-defense.<sup>141</sup>

The 1986, 1993 and 1996 actions of the United States provide the basis in state practice (thus customary international law) for articulating an expansionist view in the text of Article 51.<sup>142</sup> Instead of stretching Article 51 to accommodate all forms of so called self-defense, customary international law now supports the use of force when the purpose is that of

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<sup>140</sup> *Id.* (citing Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 ACAD. DE DROIT INT'L RECUEIL DES COURS 455, 496-98 (1958)). Sir Waldock states "Where there is convincing evidence not merely of threats and potential danger but of an armed attack being actually mounted, then an armed attack may be said to have begun to occur, though it has not passed the frontier."

<sup>141</sup> Beres, *supra* note 73, at 322. "According to Article 53 of the Vienna Convention on the Law of Treaties, a preemptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* (citing Vienna Convention on the Law of Treaties, done May 22, 1969, opened for signature May 23, 1969, art. 53, 8 I.L.M. 679).

<sup>142</sup> Wallace, *supra* note 129, at 259.

detering future aggression as well as for retributive purposes.<sup>143</sup> By elevating reprisal to a preemptory norm or jus cogens norm through state practice, acts of reprisal can be analyzed by the same criteria set forth in the analysis of self-defense.<sup>144</sup> The international community must recognize that self-defense has been expanded beyond just a protective action.<sup>145</sup>

#### *E. Analysis of Self-Defense*

One method proposes the following analysis of actions characterized as legitimate self-defense.<sup>146</sup>

- (1) Has there been a violation of a legal obligation?
- (2) Has the United Nations Security Council taken measures to stop the aggressor states actions?

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<sup>143</sup> See Statute of the International Court of Justice, art. 38, para. 1(b). (stating "international custom, as evidence of a general practice accepted as law").

<sup>144</sup> Beres, *supra* note 73, at 322. (referring to the Vienna Convention on the Law of Treaties, done May 22, 1969, opened for signature May 23, 1969, art. 53, 8 I.L.M. 679).

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<sup>145</sup> See IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 240-45 (1991) (arguing "that defining self-defense punitively would be a step backwards in the development of international law to a time when nations could use force to enforce various legal rights."). To follow this approach would be to ignore the stated purposes of the three recent actions discussed *infra*. The discussion *infra* illuminates the total erosion of the traditionally accepted uses of force in self-defense.

<sup>146</sup> Maxon, *supra* note 69.

- (3) Is the purpose of the response directed towards protection of the status quo?
- (4) Is the response timely?
- (5) Is the force used necessary?
- (6) Is the use of force necessary?
- (7) Is the use of force proportionate to the aggression?
- (8) Has the use of force been reported to the UN Security Council?

A model similar to this one is used in the analysis of reprisals *infra*, at VII.A. By applying this model self-defense and reprisals are shown to be subject to analysis under the same criteria. This thesis proposes that the status quo criteria be eliminated as irrelevant because the status quo has become unacceptable by the time an action is initiated. This thesis also proposes the addition of a criteria addressing purpose or intent because it shows that in recent actions, the purpose of self-defense and reprisal has now merged. Additionally, this thesis proposes the inclusion of a moral justification criteria to the model in order to articulate moral justification for the use of force.

## **VI. Reprisal**

### *A. Defined*

Acts of reprisal are recorded in antiquity and were a routine and accepted methodology throughout history.<sup>147</sup> Acts of reprisal against individuals (androlepsia) in response for acts committed by a state have been described as "barbaric" and "symptomatic of lawlessness."<sup>148</sup> Others have viewed acts of reprisal as "obtaining justice by self-help."<sup>149</sup> Grotius took a dim view of the Greek practice of androlepsia.<sup>150</sup> During the middle ages reprisals were used to redress wrongs committed against an individual.<sup>151</sup> With the signing of the Treaty of Paris in 1856, only states retained the right to engage in reprisals.<sup>152</sup>

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<sup>147</sup> Bederman, *supra* note 16, at 12 n.35. (citing COLEMAN PHILLIPS, 2 THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 349 (1911)):

The principal of reprisal found its legal vindication in the custom of androlepsia -literally "man seizure"-- practiced in Athens and elsewhere in Greece. Androlepsia was invoked whenever a citizen of a town was murdered by an alien or by a foreign government. Relatives of the deceased could, under the sanction of law, seize three fellow countrymen of the killer, and then hold them for ransom or for judicial condemnation to pay compensation. Relatives eligible to indulge in androlepsia were limited to those closest in degrees of consanguinity. If compensation was not forthcoming, the foreigners could be put to death in satisfaction of the blood debt.

<sup>148</sup> *Id.* n.36 (citing ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 8 (REV. ED. 1954)). "Some have said that the practice of reprisal "suggests a crude legal notion of joint responsibility of a community for actions of its members [and are] symptomatic of lawlessness and barbarism."

<sup>149</sup> SIR PAUL VINOGRADOFF, HISTORICAL TYPES OF INTERNATIONAL LAW, IN 1 BIBLIOTECA VISSERIANA DISSERTATIONUM IUS INTERNATIONALE ILLUSTRATIUM 1, 14 (1923).

<sup>150</sup> Bederman *supra* note 16, 32 n.118. Grotius did not believe that hostage taking and reprisals against innocent civilians had any place in modern law of war.

<sup>151</sup> Roberts, *supra* note 83, at 278. (letters of marque and reprisal were issued by a sovereign allowing retaliation for a wrong).

<sup>152</sup> I.L. FREIDMAN, THE LAW OF WAR, A DOCUMENTARY HISTORY 156 (1972).

Reprisals are described as "counter-measures . . . dependent on the prior act of the State against which they are directed."<sup>153</sup> They are a counter force - - or rather a reaction to an action, taken by one state against another in response to an earlier violation of international law. Reprisals are repeatedly prohibited under modern international law.<sup>154</sup> The term "reprisal" has come to be the most acceptable term of art for acts of behavior that many international legal scholars struggle hard to justify. The word "revenge" is an emotionally laden and subjective term. Retaliation and retortion are received as more rational and reasonable terms to describe what is basically the same behavior. They are all a response to a perceived act of aggression that constitutes a legal violation, territorial breach or violating a norm of civilized behavior. The term "reprisal" has been defined as "a measured, purposeful, unlawful act in response to an unlawful act of the enemy's; illegal though the reprisal may be, its justification is that nothing less will serve to stop the other in his lawless tracks."<sup>155</sup>

The traditional definition of military retribution is that of a "counter-attack, punishment or revenge."<sup>156</sup> Traditionally reprisals have been viewed as illegal but there are some that have taken the position that retribution is acceptable as long as it adheres to the applicable

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<sup>153</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF DEFENSE* 82 (1988). (citing O. Schachter, *International Law in Theory and Practice*, 178 R.C.A.D.I. 9, 168, 202 (1982)).

<sup>154</sup> U.N. CHARTER articles 20, 51(2), 52(1), 53(c), 54(4), 55(2), 56(4) all address reprisal. The Geneva Conventions of 1949 forbid reprisals against protected persons.

<sup>155</sup> Best, *supra* note 1, at 311.

<sup>156</sup> Bailey, *supra* note 22, at 53. (arguing that as long as the act conforms to recognized international law, it is not illegal).

legal requirements under international and customary law.<sup>157</sup> The only justification given for the use of force in a reprisal is when it is in retaliation for an illegal act by the aggressor.<sup>158</sup> Still others have stated that despite the historical misuse of reprisals, "reprisals are far from useless. If one respects the rules governing the use of reprisals, then reprisals serve as a reasonable weapon in the modern international legal order's arsenal to combat terrorism."<sup>159</sup>

### *B. Modern Genesis of Reprisal*

*The Naulilaa Incident Arbitration* has been called the basis for the modern formulation of the reprisal concept.<sup>160</sup> The ruling of the international arbitration panel in that case has served as the basis for the generally accepted definition of peacetime reprisals. Herein lies

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<sup>157</sup> *Id.* (contrasting reprisals with retribution when the retribution is within an already existing armed conflict). The reprisal Bailey refers to is an act which is contrary to any customary law.

<sup>158</sup> *Id.* at 54. (citing DENISE BINDERSCHEDLER-ROBERT, *LAW OF ARMED CONFLICTS* 58 (1970)). Bailey states "reprisals can be exercised only to stop a violation or prevent its repetition . . . . the rationale behind reprisals is that a belligerent should not be put at a disadvantage because the enemy breaks the rules." This would suggest the main purpose of a reprisal is deterrence, rather than punishment for the illegal act when in fact reprisals serve both purposes.

<sup>159</sup> Roberts, *supra* note 83, at 279.

<sup>160</sup> *Id.* (citing the *Naulilaa Incident Arbitration* (Port v. Ger.) 2 REP. INT'L. ARB. AWARDS 1012 (1928) reprinted in W. BISHOP *INTERNATIONAL LAW, CASES AND MATERIALS* 902-4 (3d ed. 1971)). In 1914 Portugal was still neutral despite the growing hostilities in Europe. Two German officers and another German government official were killed in Southwest Africa by a Portuguese frontier garrison at a place called Naulilaa in Portuguese Angola. Germany sent military forces into Portuguese Angola and destroyed several forts in retaliation. The matter was submitted to arbitration.



the modern misconception that self-defense and reprisals are at different locations temporally. The panel specified the following prerequisites for legal reprisals:

The first prerequisite, *sine qua non*, for the right to exercise reprisals is an occasion furnished by a previous act contrary to international law . . . . Reprisals are only lawful when preceded by an unsatisfied demand . . . . Even if one admitted that international law does not require that the reprisal be approximately measured by the offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them.<sup>161</sup>

These elements were further refined and expanded:

(1) The target state must be guilty of a prior international delinquency against the claimant state; (2) An attempt by the claimant state to obtain redress or protection by other means must be known to have been made, and failed, or to be inappropriate or impossible in the circumstances; (3) The claimant's use of force must be limited to the necessities of the case and proportionate to the wrong done by the target state.<sup>162</sup>

The following explanation of the difference between self-defense and reprisal gets to the very essence of the two actions. It directly supports the assertion of this thesis that actions can have both self-defense and reprisal characteristics. Recognizing duality of purpose eliminates it as a criteria for differentiation between self-defense and reprisals. It does not eliminate an examination of purpose as a criteria in determining legality because any action must still conform to requirements of proportionality, discrimination and necessity.

Reference to the element of intent can distinguish reprisal from self-defense. Self-defense is future oriented since its goal is state security against threats to its territory or sovereignty. Reprisals, on the other hand, are oriented to the past; they seek to punish previous illegal acts and prevent their recurrence. However, the distinction between self-defense and reprisals is far harder to

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 280. (citing Bowett, *supra* note 64, at 3).

make in practice than to define. Not only is the motive or purpose of a state notoriously difficult to elucidate but, even more important, the dividing line between protection and retribution becomes more and more obscure as one moves away from a particular incident and examines the whole context in which the two or more acts of violence have occurred. Indeed, within the whole context of a continuing state of antagonism between states, with recurring acts of violence, an act of reprisal may be regarded as being the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party.<sup>163</sup>

The above determination that self-defense is "forward-looking" and reprisals are "backward-looking" is however, incongruent with a conclusion of possible multiple intent. The conclusion that self-defense and reprisal are distinct temporally contradicts his later description that these actions can serve simultaneous preventive and retributive purposes.

Acts of reprisals are also characterized as either positive or negative reprisals. The positive reprisal is one where the victim state takes overt action. The negative reprisal is one whereby the victim state fails to perform an obligation.<sup>164</sup> Whichever form a reprisal takes, it is clear that reprisals are not either backward or forward looking retribution. Reprisals are not mutually exclusive in this regard. Each one of following goals of a reprisal could be either forward (intending to impact some future behavior of the offending state) or backward looking for punitive reasons. Possible goals of a reprisal are "(1) to enforce obedience to international law by discouraging further illegal conduct; (2) to compel a change in policy by

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* An example of a positive reprisal would be an air strike or naval bombardment or blockade. Negative reprisals can be trade sanctions and refusing to perform contractual agreements such as the sale of food or goods to the aggressor state.

the delinquent state; and (3) to force a settlement of a dispute with the delinquent state whose actions breached international law.”<sup>165</sup>

### *C. Proportionality in Reprisals*

Reprisals require the same proportionality as do self-defense. The following variable circumstances govern proportionate reprisals:

- (1) armed force in reprisal will not be used to regain redress for trivial rights;
- (2) the use of force must be executed as humanely as possible; (3) the retaliating state must avoid any use of force that would cause or escalate into a war, and; (4) the force employed must be confined to obtaining redress only.<sup>166</sup>

Consequently, a proportionate reprisal must be roughly equivalent in destruction and/or deaths to the initial aggression.<sup>167</sup> This intrinsically contains the rule of discrimination in targeting appropriate objects. The proportionality of a reprisal can also be measured by a cumulative effect on the victim state. One larger act of reprisal may be considered a proportional response to a series of smaller aggressive attacks.

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<sup>165</sup> *Id.* at 281 (citing G. HACKWORTH, 289 DIG. INT’L. L. 152 (1941)).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (noting that proportionate reprisal does not include returning evil for evil. In other words, if the initial aggression has resulted in the murdering of children or other innocents, then the reprisal is not justified to return an action of murdering the aggressor’s children).

There has been some argument that "proportionality can also be determined by reference to future action."<sup>168</sup> This infers that the proportionality of the retaliation can be large enough to deter any contemplated aggression on the aggressive states part. This argument also supports the position that reprisals have multiple purposes because they can serve deterrent purposes as well as retributive.

The Khibye incident described in the introduction of this thesis, came under severe criticism by the international community for violating the accepted standards.<sup>169</sup> It would seem that the deaths of the Jordanian civilians were not unintended violating the concept of double effect. Proportionality in the response was also violated because the Israeli response far exceeded the initial force of the terrorists in numbers of casualties. It would also appear that the Israeli's did not use the rule of discrimination. If they had adhered to the rule of discrimination, they would not have targeted the village of civilians for their reprisal. It is clear that the Khibye reprisal had a coercive, deterrence and law enforcement purpose. It was a warning for the Jordanian government to control the terrorists acting inside the Jordanian borders. The international legal community opined that a reprisal must always respond to a previous raid, must use backward-looking proportionality and must be discriminating in that the second raid must be similar to the first in target and extent.<sup>170</sup> The

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<sup>168</sup> Roberts, *supra* note 83, at 282.

<sup>169</sup> Walzer, *supra* note 2, at 218.

<sup>170</sup> *Id.* (defending counter-attacks when they adhere to the backward-looking proportionality and the principles of discrimination in targeting.) Walzer believes that when diplomacy fails, reprisals are a good alternative because they are "measures short of war".  
*Id.*

reaction by the Israelis' in the Kibbye incident was condemned by the international legal community as not having adhered to the moral and customary international legal grounds. This was not because the Israeli's did not have the moral and political justification to carry out the reprisal, but rather they did not adhere to accepted moral and legal limitations.

*D. Arguments Against Reprisal*

There have been three arguments against the use of reprisals. The first argument is that by engaging in acts of retaliation or reprisal we set in motion a never ending cycle of retaliation and revenge.<sup>171</sup> Following this argument, fear of retaliation would paralyze any nation into inaction. The second argument against reprisals is that reprisals allow the strongest military powers to prevail. The Corfu Channel case, which rejected the notion of nations administering international justice themselves, has been cited to support this argument.<sup>172</sup> What has been termed the "Clinton Doctrine of Retaliation" has been criticized as promoting the strong over the weak, undermining the global harmony envisioned by the United Nations.<sup>173</sup>

The third argument against the doctrine of reprisal is that it is more difficult to ascertain the facts. It is far easier to justify self-defense in the face of a foreign armed attack than to

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<sup>171</sup> Michael Ratner and Jules Lobel, *The Baghdad Blunder*, TEX. LAW., July 26, 1993, at 16.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

justify a reprisal on facts that arguably can not be objectively verified. The moral dilemma raised by this argument is that counterforce strategies or reprisals could be an overreaction to a perceived threat. This is of particular importance in the case of an act of terrorism when it is not clear who the actors are or what state is supporting the attack. States must be required to accurately identify the responsible party before taking retaliatory action.

The fourth argument against allowing reprisals is that it opens the door to abuse by individual states in the name of law enforcement. States should not be able to administer justice according to individual national standards and the international community can add valuable additional legal restraints. One of the reasons reprisals are "outlawed" by the UN Charter is to force nations to submit their disputes to the Security Council. States acting on their own in reprisals were seen as the proverbial "loose cannon" on the global scene.<sup>174</sup> However, the Security Council as the global enforcer of the law has not met with success. Another argument against the use of reprisal concerns its use as a deterrent. "Anticipatory reprisal" can only be speculative at best. Unlike anticipatory self-defense, which requires an

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<sup>174</sup> Bailey, *supra* note 22, at 55 argues:

It is not difficult to see how the admissibility of the notion of reprisals opens the way to abuse, and one scholar has raised the question whether "the doctrine [of reprisals] in application makes a contribution to the maintenance of law and order sufficiently great to outweigh its potentialities for abuse". "E.S. Colbert maintains that 'the right to determine when an illegal action has occurred and to decide on and direct the methods of punishment is transferred from the individual State to the Security Council which becomes itself the author of reprisals.'" The UN Security Council condemned the use of reprisals as being "incompatible with the purposes and principles of the United Nations" on 9 April 1964 in Resolution 188 (S/5650), 9 April 1964.

imminent armed attack that is quantifiable, reprisals used to deter future attacks have been called "speculative" as to the level of attack.<sup>175</sup>

*E. Arguments In Support of Reprisal*

1. *Reprisals as punishment or deterrent* - Generally, there are two theories of punishment, instrumental and retribution.<sup>176</sup> Instrumental punishment sees punishment as a deterrent, the theory being that punishing one criminal will deter other criminals from acting in similar ways. Instrumental theory also takes into account the reformation and rehabilitation of the offender. Retribution theory "sees punishment as an end not a means: the offender has done something in virtue of which there is a price to be paid by him and in undergoing punishment he pays the price."<sup>177</sup> While it has been asserted that an act of reprisal can be administered solely with the intent of deterrence without the intent of retribution, this would seem to ignore the human satisfaction of fulfilling revenge or even the value of taking retributive

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<sup>175</sup> Roberts, *supra* note 83, at 282 (arguing that reprisals should not be justified on grounds of deterrence because the injury has not yet occurred). This is untrue, as the victim state is already responding to some sort of aggressive act. The triggering event has already occurred at the time of response.

<sup>176</sup> PASKINS & DOCKRILL, *supra* note 10 at 266.

<sup>177</sup> *Id.* The authors do not believe the Nuremberg trials served any sort of instrumental purpose. "A precondition of the effectiveness of punishment as a deterrent is that the offender should fear capture, and for this reason if for none other the United Nations system was singularly ill equipped to give effect to a system of criminal (as distinct from nuclear) deterrence." The authors also believe that retribution theory as applied to the common criminal is most effective. They argue that the criminal is most often not reformed in jail, other criminals are not deterred by his confinement, he pays his price and is released. The recidivism rate among criminals and the lack of deterrence throughout history supports the position that instrumental punishment is not the best method of retribution in all cases.

actions.<sup>178</sup> "A reprisal is like retributive punishment in domestic society: as punishment assumes moral agency, so reprisal assumes political responsibility. Both assumptions are worth holding onto for as long as possible."<sup>179</sup>

## *2. Reprisals as Law Enforcement*

Reprisals have been seen as useful tools for states to "enforce the rules" of international law.<sup>180</sup> Historically, the use of reprisals was condoned only in very extreme cases, and then with at least a showing of reluctance by the international community.<sup>181</sup> Most recently, it would appear that just about any infraction of international law can be used as justification to act in reprisal behavior. The most recent US actions as discussed in this paper illustrate how acts characterized as "self-defense" under Article 51 of the UN Charter are in reality acts of reprisal.

## *3.. Reprisals as Tools of Foreign Policy*

A strong argument in favor of the use of reprisals as a legitimate tool of foreign policy is to label an ongoing terrorist campaign as an ongoing state of war. If two states can be

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<sup>178</sup> Walzer, *supra* note 2, at 212.

<sup>179</sup> Walzer, *supra* note 2, at 220.

<sup>180</sup> *Id.*

<sup>181</sup> MORRIS GREESPAN, *THE MODERN LAW OF LAND WARFARE* 411 (1959). "Only in grave cases should there be resort to reprisals."



identified as being in a state of war, then the victim state could legitimately use the same types of retaliatory acts but they are considered acts of self-defense.<sup>182</sup>

#### 4. *Legal Regulation of Reprisals*

Another argument in favor of legitimizing reprisals is that without the self-help remedy, a state may be forced to suffer so much antagonism from an aggressor state that it could lead to even greater armed conflict than just a more minor act of reprisal.<sup>183</sup> Arguably it is better to have legal regulation of this type of limited activity rather than to completely outlaw it and have no controls or restrictions on behavior. This is of course presuming that nations will continue to ignore any legal declaration outlawing reprisals. "In sum, the doctrine of peacetime reprisals establishes a desirable tool for maintaining a semblance of legal regulation over the use of force short of war. Recognition of proportional reprisals and responses in self-defense as legitimate tools of self-help will clarify the meaning of both and eliminate the necessity of trying to fit every use of armed force within the context of self-defense."<sup>184</sup> Trying to describe every use of force as an act of self-defense has eroded Article 51 to the point where it is nothing more than the grand catch-all for international actions.

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<sup>182</sup> Roberts, *supra* note 83, at 284. (noting that Israel has used this argument in its justification for reprisals against various Arab nations).

<sup>183</sup> *Id.* at 285.

<sup>184</sup> *Id.* at 286.

### *F. Analyzing Legitimacy of Reprisals*

One suggested framework for the analysis of reprisals contains many of the same requirements outlined by the early moral theologians.<sup>185</sup> These include requiring the reacting state to justify its retaliation by defining the violation of international law which has resulted in the injury; to attempt to resolve the injury by peaceful means; any force used is proportional to the injury received; the use of force be according to principles of

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<sup>185</sup> Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L. L. 441-2 (1969). Falk sets up a twelve point framework for analysis of peacetime reprisals in his analysis of the 1968 retaliatory raid by Israel in Beirut. The framework requires that:

- (1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;
- (2) that the governmental use of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;
- (3) that a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;
- (4) that a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations;
- (5) that the use of force is proportional to the provocation and calculated to avoid repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;
- (6) that the retaliatory force is directed primarily against military and paramilitary targets and against military personnel;
- (7) that the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;
- (8) that the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed;
- (9) that the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state;
- (10) that the use of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interest of the adversary;
- (11) that the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations (1)-(10), and that a disposition to accord respect to the will of the international community be evident;
- (12) that the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terrorist enterprises.

discrimination; that a report be given to the international community; the message is clear what conduct is attempting to be deterred; and that support of terrorist activities should be of special consideration in determining the level of retaliatory action. While this framework offers nothing new to the arena of reprisal analysis, it does support the notion that the intent of reprisals includes deterrence, as well as retributive motives.

Unlike a wartime reprisal, where the focus is on the proportionality and discrimination of that attack against protected persons and places, in the peacetime reprisal the attack itself is actually at issue.<sup>186</sup> Although cloaked under the guise of "self-defense", it has been argued that the rules applicable to war time reprisals must be applied to peace time reprisals as well.<sup>187</sup>

The term "peacetime reprisal" is not entirely accurate. A more descriptive term that describes the political status between which states when reprisals are likely to occur is the *demi-monde*.<sup>188</sup> During these times, acts of aggression may not always be attributable to a particular state but rather terrorist organizations. These terrorist groups may be subsidized by another state, but not usually are not officially affiliated with any nation. While this does not

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<sup>186</sup> Walzer, *supra* note 2, at 216 (describing a peacetime reprisal as one where one state is the aggressor and crosses the victim states border and commits an act of aggression. The victim state then responds in order not to re-establish the rules of war but rather to re-establish peace).

<sup>187</sup> *Id.* (arguing that even if it is called a measure of self-defense, because the peacetime reprisal is still a "military measure short of war", the restraints applicable to reprisal apply).

<sup>188</sup> *Id.* The literal translation from French means "half world".

change any sort of analysis, it is important to note that reprisals probably do not occur between states in a peaceful and cooperative political status.

### *G. Reprisals Uphold Responsibility*

Reprisals serve to hold political entities responsible for the actions committed by those they support. In this regard, reprisals support the law enforcement purpose. Even though the United Nations is not in a position to play the role of global enforcer of international law, states will not be able to divorce themselves from the acts committed by terrorist groups operating from their territory. In this regard, holding a sovereign responsible for illegal acts supports the deterrence argument.

If one argues that reprisals do not have a history of achieving any great goals, then the response is that this is not their purpose. They are a means used to deter or punish or to serve as law enforcement. The overall effectiveness of a reprisal should not be its measure. It is a specific reaction to achieve a very limited goal, executed within very definite limits.<sup>189</sup>

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<sup>189</sup> *Id.* at 221. Walzer argues in favor of the use of reprisals and the restriction placed on its use:

Reprisal is a practice carried over from the war convention to the world of "peacetime" because it provides an appropriately limited form of military action. It is better, I think, to defend the limits than to try to abolish the practice. Soldiers engaged in a reprisal raid will cross over an international boundary, but they will quickly cross back; they will act destructively, but only up to a point; they will violate sovereignty, but they will respect it. And finally, they will attend to the rights of innocent people. Reprisals are always limited responses to particular transgressions: crimes against the rules of war,

#### *H. Reprisals Under The United Nations Charter*

The four Geneva Conventions for the Protection of War Victims prohibit reprisals against protected persons.<sup>190</sup> Reprisals are also prohibited in Article 4(4) of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.<sup>191</sup> The 1977 Protocol I of the Geneva Convention provides additional constraints on acts of reprisal.<sup>192</sup> Article 60(5) of the 1969 Vienna Convention on the Law of Treaties also prohibits reprisals against protected persons.

Using force for reprisal has specifically been addressed in the UN Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among

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small-scale breaches of the peace. Though they have often been used, they cannot rightly be used, as a cover for invasions or interventions or assaults upon innocent life.

<sup>190</sup> First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 U.N.T.S. 31, 60 (Article 46); Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, 75 U.N.T.S. 85, 114, (Article 47); Third Geneva Convention Relative to the Treatment of Prisoners of War, 1949, 75 U.N.T.S. 135, 146 (Article 13); Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 75 U.N.T.S. 287, 310 (Article 33).

<sup>191</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, (1954), 249 U.N.T.S. 240, 244.

<sup>192</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977, [1977] U.N.J.Y. 95, 103, 114-16 (Articles 20, 51(6), 52(1), 53(4), 55(2) and 56(4)). Article 51 prohibits attacks against civilian populations.

States.<sup>193</sup> The prohibition against reprisals is based on Article 2(4), Article 2(3), and the limiting of force to self-defense. Article 2(4) provides for the two exceptions to the prohibition of the use of force. The use of force for self-defense or anticipatory self-defense is the legally justifiable use of force to "vindicate or secure a legal right."<sup>194</sup> It has been argued that reprisals may be legally justified under article 2(4) and not "inconsistent with UN purposes" if the use of force is not directed against a states territorial integrity or political independence of a state. Along these restrictive lines it has also been argued that if the intent of the reprisal is punishment or retribution, then it is beyond the scope of article 2(4).<sup>195</sup> This interpretation would seem to defeat the purpose of a reprisal and make its use impotent.

The accepted international legal conclusion is that reprisals are illegal under "the Article 2(4) prohibition of the use of force", the "Article 2(3) injunction to settle disputes peacefully" and the Article 51 limitation on force.<sup>196</sup> Despite this conclusion, the UN Security Council has not been uniform in its condemnation of the use of reprisals. It was noted "while

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<sup>193</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, at 121, UN. Doc. A/8028 (1971), *reprinted in* 9 I.L.M. 1292. "States have a duty to refrain from acts of reprisal involving the use of force."

<sup>194</sup> Oscar Schacter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1626 (1984).

<sup>195</sup> *Id.*

<sup>196</sup> Roberts, *supra* note 83, at 282-83. Additionally the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States also supports this conclusion by prohibiting states from using reprisals.

reprisals remain de jure illegal, they have gained de facto acceptance.”<sup>197</sup> Thus, it has been suggested that reprisals be judged on their reasonableness - - the extent of their proportionality, discrimination and grounds for retaliation (intent or purpose) - rather than to outlaw all reprisals as per se illegal.

### *I. Reprisal and Customary International Law*

1. *The Corfu Channel Case* - -In the Corfu Channel case Great Britain deployed minesweepers to Albanian waters after forty-four British sailors were killed by explosions due to Albanian mines.<sup>198</sup> Great Britain characterized this deployment as a self-help measure and not one of self-defense under Article 51 or customary international law.<sup>199</sup> The International Court of Justice views the vindication of a violation of legal rights as being basically unfair because it results in more powerful nations “perverting the administration of international justice itself.”<sup>200</sup> The result of this case was that article 2(4) did not develop as the mechanism by which reprisals were legitimized. Whenever territorial sovereignty is infringed upon is apparently enough for the court to determine that article 2(4) has been violated.

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<sup>197</sup> *Id.* at 284.

<sup>198</sup> The Corfu Channel Case (UK v. Albania), 1949 I.C.J. 4 (April 9). See also Roberts, *supra* note 131, at 269 (citing J. BRIEFLY, THE LAW OF NATIONS 426 (6th ed. 1963) where the Corfu Channel case is cited “for the proposition that retaliation is illegal but the use of force to prevent ‘expected lawful’ acts was legitimate”).

<sup>199</sup> Schacter, *supra* note 194, at 1626.

<sup>200</sup> Corfu Channel, *supra* note 198, at 35.

## 2. Reprisal Against Terrorism

Arguably the principle of universal jurisdiction allows a nation to engage in acts of abduction and reprisal against known terrorists who have acted against that nation.<sup>201</sup> The principle of universality rests on the "presumption of solidarity among states in the fight against crimes and those who commit crimes such as assassinations and bombings give any ground for their own safety."<sup>202</sup> This concept gives strength to the moral justification for reprisals in that it follows the Catholic moral position asserting order is a prerequisite for justice and evil intent is punishable.<sup>203</sup> The principle of universality is contained in the four Geneva Conventions of August 12, 1949.<sup>204</sup> Characterizing the use of universal extradition

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<sup>201</sup> Beres, *supra* note 73, at 333. Beres is making a case supporting the abduction and execution of Adolph Eichmann and for the Israeli assassination of two Islamic terrorists, Saleh Khalef (widely known as Abu Iyad) and Hael Abdel Hamid (also known as Abu al-Hol) in 1991.

<sup>202</sup> *Id.* at 333 (citing *Corpus Juris Civilis*, in GROTIVS *DE JURE BELLI EST PACIS* (bk. II, ch. 20) and EMMERICH DE VATTTEL, *LE DROIT DE GENS* (bk. I, ch. 19). VATTTEL, *LAW OF NATIONS*, 93 (1758) (Charles G. Fenwick trans., 1916). Vattel made the bold statement "Men who are by profession poisoners, assassins or incendiaries may be exterminated wherever they are caught for they direct their disastrous attacks against all Nations, by destroying the foundations of their common safety."

<sup>203</sup> See discussion *supra* Part II,B.

<sup>204</sup> See Geneva Convention No. 1, Convention for the Amelioration of the Condition of the wounded and Sick in Armed Forces in the Field, done Aug 12, 1949, *entered into force* on Oct. 21, 1950, 6 U.S.T. 3114, 75 U.N.T.S. 31, art 49 [hereinafter Geneva Convention No 1]; Convention for the Amelioiration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, done Aug. 12, 1949, *entered into force* Oct 21., 1950, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 50 [hereinafter Geneva Convention No. 2]; Convention Relative to the Treatment of Prisoners of War, done Aug. 12, 1949, *entered into force* Oct.



as a reprisal has been criticized<sup>205</sup> while others call for the flat prohibition of universal extradition altogether.<sup>206</sup> The targeting of terrorist leaders has been further justified by likening them to pirates who have historically been considered *hostes humani generis* or common enemies of humankind.<sup>207</sup> Because terrorists are considered "international outlaws" they fall within universal jurisdiction and any country against which they had acted would have jurisdiction to take action against them.<sup>208</sup> If states are not allowed to enforce the law, there is no other source for a remedy.

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21, 1950, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 129 [hereinafter Geneva Convention No. 3]; Convention Relative to the Protection of Civilian Persons in Time of War, done Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 146 [hereinafter Geneva Convention No. 4].

<sup>205</sup> Beres, *supra* note 73, at 339. That Israel has called its actions against the Palestine Liberation Organization (PLO) a "reprisal" causes Beres to note that Israel has chosen a "problematic concept under international law" by which to deal with its attackers. Beres suggests that Israel can legitimately view its relationship with the Arab world as being a continuing condition of war. This enables it to legitimately use "self-defense" as its legal rationale for anticipatory strikes rather than characterizing its actions as reprisals.

<sup>206</sup> Best, *supra* note 1, at 393 (arguing that any acts amounting to a reprisal should be banned by the international community because of the reprisal/counter-reprisal theory).

<sup>207</sup> *Id.* at 333. See also Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 5 (1996) (citing "The Charter of the International Military Tribunal of August 8, 1945 annexed to the Agreement on the Prosecution and Punishment of Major War Criminals of the European Axis, 59 Stat. 1544, 3 Brevans 1238, 82 U.N.T.S. 279, *entered into force* August 8, 1945 [hereinafter London Charter], recognized that the substantive crime termed "crimes against humanity" proscribed by Article 6(c) arose from "general principles of law recognized by civilized nations.") See also RESTATEMENT, *supra* note 71.

<sup>208</sup> *Id.*

The use of assassination as a reprisal has been considered in the case of a tyrant.<sup>209</sup> In the fall of 1990, the question was raised whether the United States should or could under international law target Saddam Hussein in order to prevent the Gulf War.<sup>210</sup> Generally, there is an assumption that assassinating foreign officials is a violation of international law.<sup>211</sup> In 1982 President Jimmy Carter signed Executive Order No. 12333 prohibiting assassinations by the United States.<sup>212</sup>

Although the UN has adopted resolutions condemning terrorism, these resolutions are ignored by actors who operate outside the boundaries of international law or countries who do not care about the resolutions.<sup>213</sup> Under the Resolution on Measures to Prevent International Terrorism, the only acts classified as terrorist were hijacking, hostage-taking and attacks on "internationally protected persons."<sup>214</sup>

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<sup>209</sup> *Id.* at 324.

<sup>210</sup> George Church, *Saddam in the Cross Hairs*, TIME, Oct 8, 1990, at 29 (arguing for and against the assassination of Saddam Hussein).

<sup>211</sup> Beres, *supra* note 73, at 324 (citing Resolution on the Definition of Aggression, G.A. Res. 3314, UN GAOR, 29th Sess., Supp. No. 31, at 142, UN Doc. A/9631 (1975), reprinted in 13 I.L.M. 710). See generally WILLIAM V. O'BRIEN, LAW AND MORALITY IN ISRAEL'S WAR WITH THE PLO 168 (1991) (explaining Israel's historical perspective).

<sup>212</sup> Exec. Order No. 12333, 2.11, 3 C.F.R. 200 (1981), reprinted in 50 U.S.C. Sec. 401 (1988).

<sup>213</sup> See Resolution on Measures to Prevent International Terrorism, G.A. Res. 40/61, UN GAOR, 40th Sess., Supp. No. 53, at 301, UN Doc. A/40/1003 (1985).

<sup>214</sup> Beres, *supra* note 73, at 326.

Assassinations of terrorist leaders have met with mixed responses. In January 1991 two PLO leaders were assassinated in Tunis.<sup>215</sup> This raised the question of whether such an act is a violation of international law, or is an act of law-enforcement because the terrorists themselves were violators of international law.<sup>216</sup> Assassinating these international villains was justified by Israel as an act of law enforcement because of the weak and "decentralized" pattern of global law enforcement.<sup>217</sup> However, if the intent of the assassination is a reprisal for past terrorist acts, then the assassination is currently illegal under international law. If the assassination is justifiable to deter future acts of terrorism, then it is a legally permissible act of self-defense against terrorism.<sup>218</sup>

## VII. Analysis of Recent US Actions

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<sup>215</sup> *Id.* at 326 n.36.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 332 n.38. Beres argues for the advancement of a global law enforcement acknowledging that due process must still be followed.

For example, it is essential that the intended victim be painstakingly identified as a terrorist (*i.e.*, that he or she be distinguished from a lawful insurgent according to the prevailing criteria of *jus ad bellum* and *jus in bello*); that he or she be guilty of a major or egregious crime involving loss of life against the state considering assassination; that guilt be determined "beyond a reasonable doubt;" and that the normal processes of extradition and prosecution are patently unworkable. Moreover, it must be plain that abduction for trial, as an alternative to assassination (*e.g.*, the Eichmann case and Israel) would be impossible or would create a variety of major risks that would likely produce an even greater loss of life.

<sup>218</sup> *Id.*

## A. The 1986 US Attack Against Libya

### 1. The Facts

In 1973, the United States Department of State declined to adopt reprisals as a legitimate means of self-help.<sup>219</sup> By 1985, the use of terrorism had increased dramatically. In 1985 there were more incidents of international terrorism than any other time in history with 800 reported terrorist incidents worldwide.<sup>220</sup> International terrorism became a significant issue. State sponsored terrorism is an attractive alternative to conventional warfare for nations unable to afford large conventional forces.<sup>221</sup> Because the Security Council is ineffective in the face of terrorism, "when law and diplomacy fail, states look to other methods of protecting themselves. Foremost among these is the use of force."<sup>222</sup> After the release of the

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<sup>219</sup> Roberts, *supra* note 83, at 286 (citing Statement of Ms. J. W. Willis, Deputy Assistant Legal Advisor for European Affairs, Dept. of State, 1979 DIGEST OF US PRACTICE IN INT'L L. 1749, 1752 (1983)). The United States State Department declined to follow the advice of Professor Rostow who advised that "the United States condone reprisals as [a] measure of self-help when a state cannot or will not fulfill its international obligations." *Id.*

<sup>220</sup> Statement of Secretary of Defense Caspar Weinberger before the opening session of the American Bar Association's National Conference on Law in Retaliation to Terrorism, June 5, 1986, reported in 8 ABA STANDING COMMITTEE LAW AND NATIONAL SECURITY INTELLIGENCE REPORT 8 (July 1986). Additionally there were over 2,177 casualties and 877 deaths.

<sup>221</sup> Roberts, *supra* note 83, at 245. "In sum terrorism has become another 'weapons system', a cheap means of waging war against one's enemies." (citing *Legislation to Combat Terrorism: Hearings on H.R. Res. 233: H.R. Con. Res. 339; H.R. 5612; H.R. 6311 before the Subcomms. on International Security and Scientific Affairs and International Operations of the House Comm. on Foreign Affairs, 98th Congress, 1st Sess. 25 (1983) (statement of Brian M. Jenkins, Director, Security and Subnational Conflict Program, Rand Corp.)*

<sup>222</sup> *Id.*

hostages in Iran in 1981, President Reagan stated "Let terrorists be aware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution."<sup>223</sup>

Despite the stated 1973 policy of reprisals, US officials were sounding more inclined to use force in retaliation to terrorist attacks and to protect the nation.<sup>224</sup> The US State Department indicated a willingness to "go beyond passive defense to consider means of active prevention, preemption and retaliation. Our goal must be to prevent and deter future terrorist acts and experience has taught over the years that one of the deterrents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it."<sup>225</sup>

In March 1986, Libya's Foreign Minister Kamel al-Mansour protested American Naval maneuvers near the Gulf of Sidra.<sup>226</sup> "The US Navy had conducted Freedom of Navigation

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<sup>223</sup> N.Y. TIMES, Feb 3, 1981 at B13, col. 3.

<sup>224</sup> Address by Secretary of State George Shultz, *Terrorism and the Modern World*, The Scherr Lecture, at the Park Avenue Synagogue, New York, October 25, 1984, at 23, reported in NY TIMES, Oct. 26, 1984, at 12. Secretary of State George Shultz made a forceful speech declaring that the United States "must be ready to use military force to fight terrorism and retaliate for terrorist attacks even before all the facts are known." He went on to say that "we may never have the kind of evidence that can stand up in an American court of law" but that should not deter the United States from taking action. He further stated "We cannot allow ourselves to become the Hamlet of nations, worrying endlessly over whether and how to respond. A great nation with global responsibilities cannot afford to be hamstrung by confusion and indecisiveness. Fighting terrorism will not be a clean or pleasant contest, but we have to play it."

<sup>225</sup> *Id.*

<sup>226</sup> *Libya Protests To UN Over Clash With US Fleet*, REUTERS, March 25, 1986, International News. The Libyan Foreign Minister said this showed the "deliberate intentions

(FON) exercises in the Bay of Sidra during 1973, 1979 and 1981-86 to challenge Colonel Gadhafi's claim to sovereignty over the bay."<sup>227</sup> During the exercises in January 1986, several Libyan patrol boats were sunk in some clashes with US forces. Qadhafi then threatened terrorist attacks against the US and its citizens in retaliation.<sup>228</sup>

The Libyan Foreign Minister was asserting under customary international law that Libya had the right to protect its political independence, territorial integrity and its citizens. Libya claimed that "peace in the region, in fact throughout the whole world, is being exposed to a serious adventure by the United States."<sup>229</sup> Libya was invoking its rights of self-defense under Article 51. The Soviet Union denounced the actions of the United States and characterized the US actions as those of piracy.<sup>230</sup> The US had attempted pacific means of

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of the United States to encroach on the sovereignty, freedom and security of Libyan territory and waters."

<sup>227</sup> O'Brien, *supra* note 4, at 463.

<sup>228</sup> See *supra* note 226.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* The Soviet news agency Tass, described the US actions as "an act of open and armed aggression" which "has violated all norms of international law". Tass compared US actions to those "which Americans employed in the Gulf of Tonkin incident which preceded the US military involvement in Vietnam." The characterization of the US actions as "piracy" were apparently a favorite way to describe US actions as the Soviets described the 1981 destruction of two Libyan fighter planes also as piracy. In a further attempt to criminalize the US actions under Article 51, the Prime Minister of Iran stated in the article "The US aggression against the Gulf of Sidran was a flagrant violation against the international integrity of an Islamic country and therefore is considered as an aggression against all Islamic states." Attributing an action against one Islamic state as an action against all Islamic states is not in accordance with any international law because coalitions by religion are not recognized.

convincing Qaddafi to end his support of international terrorism. The US also tried economic sanctions against Libya and had publicly condemned their involvement in terrorism. Despite these actions, Qaddafi repeatedly expressed his desire to continue to target American citizens.<sup>231</sup>

On April 5, 1986, a terrorist bomb exploded in a West Berlin discotheque frequented by American service members. Two Americans and a Turkish woman were killed with 239 other persons, mostly Americans, wounded. Although the United States did not publicly disclose all of the information tying Libya to the terrorist actions, there was apparently "compelling evidence" leading right to Qaddafi.<sup>232</sup>

On April 15, 1986, President Reagan ordered US air and naval forces to simultaneously bomb known terrorist headquarters and military installations providing support to terrorist activities.<sup>233</sup> The targets were chosen in accordance with the principle of proportionality and

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<sup>231</sup> *Libya Under Qaddafi*, NY. TIMES, Jan 9, 1986 at A6.

<sup>232</sup> N.Y. TIMES, April 15, 1986 at A11. White House press Secretary Larry Speaks cited evidence from previous attacks and comments made by Qadhafi himself.

<sup>233</sup> 1986 PUB. PAPERS OF THE PRESIDENTS, Letter to the Speaker of the House and the President Pro Tempore of the Senate. *See also* Reagan, *The New Network of Terrorist States*, 85 DEP'T ST. BULL. 7, 9 (Aug. 1985). President Reagan justified the attack by stating:

These strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike, directed at the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan ordered bombing of a discotheque in West Berlin on April 5.

discrimination because they were directly related to known terrorist activities and were providing logistic and training support to such operations.<sup>234</sup> President Reagan invoked the US's right of self-defense under Article 51, characterizing the strikes as "necessary and appropriate" preemptive strikes "designed to deter acts of terrorism by Libya."<sup>235</sup> While the strikes against Libya were characterized as preemptive to deter future actions against US citizens abroad and against US military personnel, they could also be characterized as retaliatory for Libyan sponsored terrorism. In a White House statement President Reagan stated "It is our hope that action will preempt and discourage Libyan attacks against innocent civilians in the future."<sup>236</sup> The bombing "was publicly and officially identified as being a legitimate retaliation against terrorism."<sup>237</sup>

## 2. *Legal Analysis*

The US was using the expansionist approach to justify the strike against Libya. The international condemnation of the US attack against Libya attack reflects the restrictivist view. According the restrictive theory, Libya was not actively engaging in an armed attack

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<sup>234</sup> *Id.* The President's letter to the Senate describes the targets as "carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians."

<sup>235</sup> *Id.*

<sup>236</sup> President Reagan's Letter to Congress, April 16, 1986 DEP'T ST. BULL. 8 (June 1986).

<sup>237</sup> Beres, *supra* note 12, at 7.



against the United States at the time of the air strikes so the United States could not make the self-defense claim.<sup>238</sup>

The expansionist position is that "the recurring past terrorist acts committed by Libya constituted a pattern of continuing international aggression against the United States that justified Article 51 measures."<sup>239</sup> It was considered a "continuing war".<sup>240</sup>

The following is the proposed model for legal analysis of this action. It is a combination of the aforementioned models of self-defense analysis and analysis for reprisals along with traditional moral justification. This model uses the same criteria as those used for the self-defense analysis, with the addition of the intent and moral justification criteria. It demonstrates that actions of reprisal can be justified on the same legal grounds as self-defense. The purpose of the action against Libya is multiple in that it is "backward looking" (punitive) while at the same time "forward looking" (deterrence and protection). This

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<sup>238</sup> Baker, *supra* note 115, at 111.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* Baker makes an interesting comparison with the UN security Council's rejection of a similar argument made by Israel when they claimed that from 1968 through 1978 they had been subjected to so many terrorist attacks by the Palestine Liberation Organization that they were justified in responding with force. This is termed the Nadelsticchtaktik (needle prick) theory or the "accumulation of events" theory and described as:

According to this doctrine of international law, . . . . each specific act of terrorism, or needle prick, may not qualify as an armed attack that entitles the victim state to respond legitimately with armed force. But the totality of the incidents may demonstrate a systematic campaign of minor terrorist activities that does rise to the intolerable level of armed attack.

analysis concludes that this action can exist contemporaneously as self-defense and reprisal in accordance with the theory advanced in the linear temporal model.<sup>241</sup>

(1) Was there an infringement or threatened infringement of the territorial integrity or political independence of the victim state resulting in a legal violation?

(2) Has there been an attempt at pacific redress?

(3) Was the use of force by the responding state (the United States) necessary and proportionate to the injury?

(4) Was the reactionary force reported to the international community?

(5) What was the intent of the reactionary force?

(6) Was the force in accordance with traditional moral justification?

(1) Was there an infringement or threatened infringement of the territorial integrity or political independence of the victim state resulting in a legal violation? The reaction by the United States was in response to Libyan sponsored terrorist actions around the world over a period of time. Libya has an affirmative obligation to refrain from sponsoring terrorism that threatens the political independence of the United States.

(2) Has there been an attempt at pacific redress? The United States made repeated attempts at peaceful redress but to no avail.

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<sup>241</sup> See *supra* Part IV, A.

(3) Was the use of force by the United States necessary and proportionate to the injury? The US response was proportionate. The US strikes were limited in duration and location. They targeted a military airport near Tripoli, a military command and control center, a terrorist training camp and a military site from which defensive attacks could be launched. The US had attempted diplomatic means to curb the state sponsored terrorism. It had not worked. Therefore, the response by the US was proportionate and necessary.<sup>242</sup>

(4) Was the reactionary force reported to the international community? The United States was condemned for not submitting the dispute over the Gulf of Sidra and the issue of Libya's support of terrorist acts to the Security Council before taking armed measures. In failing to take the matters to the Security Council, the US has been cited as violating Article 37(1) requirement for dispute resolution.<sup>243</sup> The UN General Assembly voted 79 to 28 with 33 abstentions condemning the United States in a non-binding resolution that cited the United States for violating international law.<sup>244</sup>

(5) What was the intent of the reactionary force? The US strikes were indeed an attempt to prevent Libya from engaging in future terrorist action and at the same time, retaliation for

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<sup>242</sup> Baker *supra* note 111, at 42 (citing the International Law Society's approval of the bombings as "quite justified"). The response was called proportional to the events that triggered it.

<sup>243</sup> Article 37(1) requires that parties to any dispute which may endanger international peace shall attempt to use negotiations, mediation, arbitration, etc) and if they fail, they refer the matter to the Security Council.

<sup>244</sup> L.A. TIMES, November 21, 1986, page 2 part 1 column 1.

past acts of the Libyans. This dual purpose blurs the temporal distinction between self-defense and reprisal.<sup>245</sup> The deterrent purpose of the attack is very clear from Presidential statements. President Reagan's letter to the Senate states "Should Libyan sponsored terrorist attacks against the United States citizens not cease, we will take appropriate measures necessary to protect United States citizens in the exercise of our right of self-defense."<sup>246</sup>

(6) Was the force in accordance with traditional moral justification? Terrorist acts violate the rule against discrimination in that they target innocents. As St. Thomas argued, it is not just the act committed by the aggressor, but an evil intent justifies punishment. Targeting innocent civilians is evil and warrants deterrent as well as punitive action. When societal order is threatened then use of force is justified. Terrorist acts greatly disrupt societal order and are contrary to international law. Thus, the US was justified in its retaliation.

The immediate US response was cited as another element supporting the justification under Article 51 and self-defense. There was only a ten day interval between the West Berlin bombing and the US strikes against Libya. While the United States meets this traditional criteria in the 1986 Libya action, in the 1993 and 1996 attacks on Iraq it is clear that this is no longer a requirement under customary international law in the case of terrorism.

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<sup>245</sup> NY TIMES, *supra* note 233, Larry Speaks comments "Indeed, with the whole context of a continuing state of antagonism between states, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both in the form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party."

<sup>246</sup> PUB. PAPERS, *supra* note 253.

The US actions were permissible under Article 51 and through this analysis it can be seen that Article 51 is expanding to encompass actions that can not only be characterized as self-defense but also have characteristics of reprisal. The US response met all the criteria of a reasonable reprisal according to the models.

Despite the international legal rhetoric describing the actions of the US, the press saw the strikes against Libya as retribution for past terrorist acts, hence opening the US government up to accusations of being in violation of international law.<sup>247</sup> The Reagan administration and Secretary George Schultz were accused of openly engaging in the "advocacy of military

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<sup>247</sup> George Church, *Hitting the Source: US Bombers Strike at Libya's author of Terrorism, Dividing Europe and Threatening a Rash of Retaliations*, TIME, April 28, 1986, at 16. "The US launched its bombers out of a grim conviction that ruthless attacks on Americans and citizens of many other countries will never let up until terrorists and the states that sponsor them are made to pay a price in kind." This supports the contention that the strikes were in retaliation for attacks on US citizens, rather than solely as a deterrence to future acts of terrorism. The article continues:

In any case, the Reagan administration had decided to go ahead with the raid whatever the cost in relations with the allies and the Soviets - - and, for that matter, at what ever price in an immediate spasm of fresh terrorism. Why? Of all people, Secretary of Defense Casper Weinberger, who had long been publicly dubious about military reprisals against terrorism, put the rationale most succinctly. Terrorism, Weinberger declared in a Boston speech, 'is now a state-practiced activity, a method of waging war' planned and organized by governments convinced of their impunity. It will get worse until the United States convinces them otherwise, he said.

Secretary Shultz is quoted later in the article as stating "if you raise the costs [of inciting terrorism], you do something that should, eventually, act as a deterrent."

reprisals".<sup>248</sup> During this time, economic sanctions and political pressure from other nations did not appear to be deterring Libya and Syria from engaging in the terrorist acts. More than once the actions of President Reagan are referred to as reprisals and "to punish Qaddafi".<sup>249</sup> The US media questioned the validity of the US actions under Article 51.<sup>250</sup> Despite the fact that it is clear that US strikes were targeting Qaddafi, there was no mention of Executive Order 12333 and its prohibition on assassinating a foreign head of state.

This action set precedence for the subsequent actions by the Clinton administration, which clearly show further stretching of Article 51. When alternatives short of armed force do not work, counteraction may be the only recourse.<sup>251</sup>

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<sup>248</sup> *Id.* "Still, Reagan had laid down and stuck to an all important precondition for any outright reprisal attack: it had to be directed against a target that could be proved responsible for a specific terrorist attack." It was not until it was publicly revealed that the United States had broken the Libyan diplomatic code and intercepted messages that Libya and Gaddafi were linked to the terrorist activities. *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

In private communications to Washington [Prime Minister] Thatcher insisted that any US action had to be justified as one taken under the inherent right of self-defense recognized in Article 51 of the United Nations Charter. Whether the strike against Libya really met that condition is at best questionable; Article 51 refers to self-defense "if an armed attack occurs."

<sup>251</sup> SHELDON M. COHEN, *ARMS AND JUDGMENT* 78 (1989). The author explains that the 1986 bombing of Libya demonstrates how US foreign policy was no longer effective with Libya and that the use of force was a legitimate countermeasure. Cohen lays blame at the feet of the UN Security Council and the International Court of Justice. He describes the structure of the Security Council as impotent because of the veto power by certain permanent members. The International Courts weakness stems from the unwillingness of international parties to voluntarily submit to adjudication.

## *B. The 1993 Attack Against Iraq*

### *1. Facts*

After Iraq was defeated in the Gulf War, the UN Security Council issued UN Resolution 686 on March 2, 1991 which ended the war and demanded that Iraq “3.(a) Cease hostile or provocative actions by its forces against all Member States including missile attacks and flights of combat aircraft” among other demands.<sup>252</sup> Two days later, the Security Council issued UN Resolution 688 which cited Article 2, paragraph 7 of the UN Charter and condemned the “repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region, . . .”<sup>253</sup> Resolution 688 also demanded that Iraq immediately end this repression. Several coalition nations, led by the United States, established a “no-fly” zone above the 36th parallel that prohibited Iraqi aircraft.

Despite its defeat in the Gulf War, Iraq continued to pursue a policy of international provocation.<sup>254</sup> In July 1992, Iraq refused to permit UN inspectors to conduct inspections of

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<sup>252</sup> See Appendix B-1.

<sup>253</sup> See Appendix B-2.

<sup>254</sup> Eric Schmitt, *Iraqi Gunners Fire on American Jets in North, US Says*, N.Y. TIMES, April 10, 1993, at 1. Iraq was consistently violating the no-fly zone and Iraqi gunners fired

Iraqi facilities in violation of the terms of the 1991 cease-fire.<sup>255</sup> The reluctance to comply with the cease fire agreement continued into 1993 when Iraq refused to comply with the Security Council's resolution concerning surveillance of Iraq's missile test sites.<sup>256</sup> In addition to thumbing it's nose at the UN and the rest of the world, evidence surfaced in June 1993 that pointed directly to the Iraqi government's involvement in a plot to assassinate President George Bush in retaliation for the Gulf War.<sup>257</sup>

Mr. Bush was visiting Kuwait in April 1993 to receive an honorary degree from Kuwait University. The terrorist plan was to detonate a bomb during his acceptance speech which would have killed or injured anyone within a 400 yard radius.<sup>258</sup> After aborting the plan, the

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at US aircraft. Again the next month, in June another US aircraft was locked on by Iraqi radar and again in July. See also Douglas Jehl, *US Jet Patrolling Iraq Fires Missile at Artillery Site*, N.Y. TIMES, June 30, 1993, at A3; Stephen Engelberg, *Another US Jet on Patrol Fires at Iraqi Antiaircraft Battery*, N.Y. TIMES, July 26, 1993, at A6.

<sup>255</sup> *Iraq Refuses to Permit UN Inspection*, ORLANDO SENTINEL TRIB., July 20, 1992, at A6.

<sup>256</sup> Douglas Jehl, *Clinton Bluntly Warns Iraq to Yield To Arms Inspectors*, N.Y. TIMES, June 26, 1993, at 1. The Security Council resolution required Iraq to allow UN inspectors to install surveillance cameras at test sites.

<sup>257</sup> *Trail of Evidence Led to Baghdad*, USA TODAY, June 28, 1993, at 3A. It was reported that a car bomb and explosives were found. In a speech to the United Nations, Ambassador Madeleine Albright stated that the US was "highly confident" that the evidence led straight to Saddam Hussein. She showed the UN Assembly pictures of the explosive devices which were discovered after Kuwaiti police arrested 13 Iraqi's and two Kuwaitis allegedly involved in the plot. Several of those arrested admitted that Iraqi intelligence had assigned them the mission of killing President Bush. The bomb forensics also were identified to have been the product of Iraqi intelligence.

<sup>258</sup> *Id.*



suspects were found wandering in the desert by the Kuwaiti authorities.<sup>259</sup> The arrested suspects confessed that they were working for the Iraqi government.

A two month investigation revealed an important explosive forensic evidentiary link to the Iraqi Intelligence Service. National Security Advisor Anthony Lake claimed that "the soldering method and wiring of the Kuwait University bomb bore an Iraqi signature."<sup>260</sup> There were some doubts however, about the accuracy of the information implicating the Iraqi government. Some bomb experts cast doubt as to the certainty of the Iraqi "signature" saying it would be impossible to identify signature traits because the parts used were common parts available to anyone.<sup>261</sup> Other experts opined that there was sufficient signature evidence to implicate Iraq. Much of the information concerning the actual evidence was not released to the public for security reasons.<sup>262</sup>

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<sup>259</sup> See Douglas Jehl, *US Convinced Iraqi Saboteurs Plotted to Kill Bush*, N.Y. TIMES, May 8, 1993, 1 at 5.

<sup>260</sup> Surchin, *supra* note 70, at 462.

<sup>261</sup> Douglas Jehl, *US Says It Waited for Certain Proof Before Iraq Raid*, N.Y. TIMES, June 29, 1993, at A1. According to one journalist, the photograph presented to the Security Council showed a remote control which was a easily available commercial item. Whether signature elements were available from the items found was said to be questionable by bomb experts from the State Department.

<sup>262</sup> USA TODAY, June 28, 1993, at 1.

One June 26, 1993, the United States fired twenty-three Tomahawk cruise missiles from US Naval warships in the Red Sea and the Persian Gulf.<sup>263</sup> Twenty missiles hit the intended target, the Iraqi intelligence headquarters. Three other missiles went off course and struck residential neighborhoods. According to Pentagon officials, the missiles were fired during the night to minimize casualties.<sup>264</sup>

In his June 26, 1993, address to the nation, President Clinton outlined the discovery of the assassination plot and subsequent investigation. The findings were enough to convince him that the Iraqi Intelligence Service had been responsible for the plot. President Clinton characterized the plot as “[an] Iraqi attack against President Bush was an attack against our country and against all Americans.”<sup>265</sup> President Clinton revealed that he had called for an emergency meeting of the UN Security Council “to expose Iraq’s crime” but this was after the strike had been executed against Iraq.

President Clinton specifically addresses the intent of the strike. He states “Saddam Hussein has demonstrated repeatedly that he will resort to terrorism or aggression if left unchecked. Our intent was to target Iraq’s capacity to support violence against the United States and other nations, and to deter Saddam Hussein from supporting such outlaw behavior

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<sup>263</sup> Gwen Ifill, *Clinton Bluntly Reports Compelling Evidence Found Against Iraq*, N.Y. TIMES, June 27, 1993, at A1.

<sup>264</sup> Eric Schmitt, *US Says Strike Crippled Iraq’s Capacity for Terror*, N.Y. TIMES, June 28, 1993, at 1.

<sup>265</sup> See President William J. Clinton, Remarks by the President in Address to the Nation, The Oval Office (June 26, 1993), The White House Press Secretary.

in the future. Therefore, we directed our action against the facility associated with Iraq's support of terrorism, while making every effort to minimize the loss of innocent life."<sup>266</sup> In later comments Clinton stated that he had decided to bomb Iraq in retaliation for what he characterized as "Iraq's disregard for international law" and that no "diplomatic or economic measure could deter Iraq from attempting further assassinations in the future."<sup>267</sup>

President Clinton enjoyed large US popular support and support in Congress.<sup>268</sup> Surprisingly, the international community was relatively quiet about the US action despite the withholding of incriminating evidence by the United States from the Security Council for national security reasons until after the strike was completed.<sup>269</sup> Even the foreign ministry in Moscow characterized the attack by the US as justified self-defense under Article 51.<sup>270</sup>

## 2. Legal Analysis

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<sup>266</sup> *Id.*

<sup>267</sup> Elaine Sciolino, *Clinton Overstates Impact of Raid, His Aids Warn*, N.Y. TIMES, June 29, 1993, at A6.

<sup>268</sup> Ratner, *supra* note 171, at 16.

<sup>269</sup> The Rueter Library Report, June 27, 1993, Sunday BC cycle, all news file. Reactions from US allies were very mild. Prime Minister John Major of Great Britain said "he believed that state terrorism must be met with an unambiguous response and must be deterred by all proper and legitimate means" while France only expressed a mild comment that it had been informed of an operation against Iraq.

<sup>270</sup> Robert Marshall, MACLEAN'S, July 5, 1993, at 16.

Analyzing this incident under the same criteria as the 1986 Libyan incident shows that the purpose of the attack by the US serves the deterrent aspect of self-defense and the retributive aspect of reprisals. This further supports this thesis's proposition that recent US actions have enlarged the criteria of self-defense under Article 51 to include reprisal actions and established these actions as customary international law.

(1) Was there an infringement or threatened infringement of the territorial integrity or political independence of the victim state resulting in a legal violation? President Clinton makes a case that Iraq has violated its obligation to respect the political independence of the United States.<sup>271</sup> President Clinton describes President Bush as the political leader of the coalition that defeated Saddam Hussein and describes the assassination plot as being motivated by Bush's actions during the Gulf War. An attack against Bush was an attack against all of America. Clearly, an attack on a head of state, even a former one, would qualify as an a violation of Iraq's obligation to respect the United States political independence because it goes to the very heart of American national leadership. There has been a violation of that obligation. Additionally, Iraq acted in violation of Resolution 686, which demanded that Iraq cease hostile or provocative actions against all Member states.<sup>272</sup> An assassination attempt qualifies as a hostile or provocative act.

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<sup>271</sup> See Appendix C-1 for text of President Clintons June 26 1993 Address To The Nation.

<sup>272</sup> See Appendix B-1.

(2) Has there been an attempt at pacific redress or was the force necessary? Despite the Article 51 requirement that international disputes be submitted to the Security Council, the United States acted unilaterally in this case. There was no attempt at peaceful resolution. This is because there was nothing to resolve. The evidence clearly pointed to the Iraqi government, and there was no ongoing event to try and resolve. The triggering event was the assassination attempt itself, and that was over.

(3) Was the use of force by the United States proportionate to the injury? The strikes were aimed at the Iraqi Military Intelligence Headquarters. They were the agency directly implicated in the assassination attempt. The attack was carried out at night as to minimize civilian casualties. The weapons used were precision missiles whose accuracy is designed to cause as little collateral damage as possible. Therefore, the United States adhered to the traditional principle of discrimination. There were some civilian casualties however. These can be reconciled under the rule of double effect because these were unintended.<sup>273</sup>

(4) Was the reactionary force reported to the international community? The US actions were not approved by the UN Security Council prior to the strikes but were reported after. While the United States did call for a UN Security Council meeting in accordance with Article 51, Ambassador Albright did not request formal approval of the US action, but only presented incriminating evidence to the Council.<sup>274</sup> Ambassador Albright argued that nations

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<sup>273</sup> See discussion *supra* at II.B

<sup>274</sup> UN SCOR, 48th Sess., 3245th Mtg. at 3, UN Doc. S/PV.3245 (1993).

are allowed to assume that an attempt against a former leader, is an attack on the sovereignty of the nation itself. She also argued that the action was intended to serve as a method of "forcing a nation to obey international law."<sup>275</sup> She stated that "we ignore a crime of this magnitude at our collective peril as members of an international society that seeks to uphold the rule of law."<sup>276</sup>

(5) What was the intent or purpose of the action? The United States justified the attack under Article 51 and the right to use unilateral force in self-defense.<sup>277</sup> President Clinton cited four grounds for the attack: (1) the US was protecting its sovereignty in protecting its former leader; (2) the attack was to serve as deterrence to state sponsored terrorism; (3) to deter future threats, and; (4) it was an attempt to "enforce civilized behavior amongst nations."<sup>278</sup>

(6) Moral justification? There is moral justification in this use of force. When societal order is threatened then use of force is justified. Here, a deliberate scheme to assassinate a former head of state could be considered disruptive to US societal order. Thomist

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<sup>275</sup> Surchin, *supra* note 70, at 466.

<sup>276</sup> *Id.* (citing UN SCOR, 46th Sess., 2981st mtg. at 9, UN Doc. S/RES/687 (1991)).

<sup>277</sup> Marshall, *supra* note 270, at 16. In his address to the American people, President Clinton invoke the term "Don't tread on me" in vowing to combat terrorism. Clinton said the attack was in "retaliation for compelling evidence of top-level Iraqi involvement in an attempt to assassinate former President George Bush during a visit to Kuwait in April". Clinton continued by saying the American people could "not tolerate a loathsome and cowardly attempt on Bush's life."

<sup>278</sup> Surchin, *supra* note 70, at 57.

interpretation would insist that the evil intent of the attacker justifies a retributive response. Clearly the United States would be justified in responding for retributive reasons because evil intent is the only reason to order the murder of a former President.

This language illustrates the dual retributive (backward looking) and deterrent (forward looking) nature of the US strike. The US goal is to punish Iraq for its unacceptable behavior and to deter similar behavior in the future. The action also serves a law enforcement function because it attempts to compel Iraq into compliance with UN Resolution 686 and to engage in acceptable behavior under customary international law. It was also argued that Iraq had violated Security Council Resolution 687 whereby Iraq promised to cease state sponsored terrorism.<sup>279</sup> Almost all nations, with the exception of China, were supportive of the retaliatory actions of the United States, when the incriminating evidence was presented at the UN.

Arguably the 1993 attack on Iraq was not in response to a conventional armed attack or even in response to the normal type of terrorist act. Nevertheless, it was justified under Article 51 as self-defense.<sup>280</sup> The passive reaction by most of the international community

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<sup>279</sup> UN SCOR, 48th Sess., 3245th mtg. at 3, UN Doc. S/PV.3245 (1993). This argument was set forth by the ambassador from Great Britain.

<sup>280</sup> See *Albright Addresses UN Security Council*, available in LEXIS, Nexis Library, Script File for the text of the June 27, 1993 speech. UN Ambassador Madeline Albright reported the preliminary airstrike and presented the Council with the evidence of the attempted assassination, in accordance with the Article 51 reporting procedures. See also Stanley Meisler, *UN Reaction Mild as US Explains Raid*, L.A. TIMES, June 28, 1993, at A1. Ambassador Albright also stated "In our judgment, every member here today would regard

can be explained by the demise of the restrictivist view of Article 51 supported so long by the communist block.<sup>281</sup>

Comparing the legal justification for the 1986 bombing of Libya with the 1993 bombing of Iraq clearly shows that the claim of self-defense under Article 51 has been significantly eroded. The 1993 bombing of Iraq is described as totally "obliterating the distinction between reprisal and self-defense that is fundamental to the UN Charter."<sup>282</sup> Prior to the end of the cold war, US foreign policy carefully noted the distinction between acts of reprisal and acts of self-defense. In 1974 Secretary of State Kenneth Rush stated that he believed it important to "maintain the distinction between lawful self-defense and unlawful reprisal."<sup>283</sup> It is clear from these two actions that any distinction, between self-defense and reprisal have blurred significantly.

The US actions were condemned by Arab states as being a "double standard" because at this point, the US had taken no similar actions against the Bosnian Serbs who were also

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an assassination attempt against its former head of state as an attack against itself, and would react."

<sup>281</sup> See, e.g., Simon Jenkins, *Hollywood Morality Gone Mad*, TIMES LONDON, June 30, 1993, at 18; Michael Ratner & Jiles Lobel, *Bombing Baghdad, Revisited: Lawful Self-defense or Unlawful Reprisal?*, CONN. L. TRIBB., July 19, 1993, at 24; John Roberts, *Iraq: Moral and Legal Reasons Behind Attack Under Question*, Inter Press Service, June 28, 1993, available in Lexis, World Library, INPRES File.

<sup>282</sup> Ratner, *supra* note 171.

<sup>283</sup> *Id.* Secretary of State Kenneth Rush believed this distinction to be necessary because the doctrine of reprisal is easily abused.



ignoring international law in their practice of ethnic cleansing in the former Yugoslavia.<sup>284</sup>

Canadian Prime Minister Kim Campbell warned that if this type of reprisal was allowed then “powerful nations would have an ability to employ unilateral measures and then justify such measures afterward.”<sup>285</sup> Despite this mild criticism, in 1996 the US engaged in another reprisal attack on Iraq.

### *C. The 1996 Attack on Iraq*

#### *1. Facts*

Following the Gulf War, the Security Council passed Resolution 688, condemning Iraqi repression of the Kurdish people. The resolution stated that the Iraqi repression had led to “a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region.”<sup>286</sup> The resolution also demanded that Iraq allow immediate access by humanitarian organizations to those in need of assistance.<sup>287</sup> Shortly thereafter, a coalition led by the United States established a no-fly zone north of 36th parallel in Iraq. A no fly zone was also established in the south. The

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<sup>284</sup> See Youssef Ibrahim, *Islamic Nations See Double Standard in US Raid*, N.Y. TIMES, June 29, 1993, at A6.

<sup>285</sup> Surchin, *supra* note 70 at 469 n.73 (citing Campbell: *US Strike “Justifiable”*, *UN Needs Reform* (Montreal Radio Canada International, June 28, 1993), available in F.B.I.S. (WEU-93-125), July 1, 1993, at 13).

<sup>286</sup> See Appendix B-2.

<sup>287</sup> *Id.*

Kurdish rebels split into two factions, the Kurdistan Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK). The PUK seized the town of Irbil in northern Iraq. These two factions were fighting among themselves and the KDP had aligned itself with Saddam Hussein asking him for assistance in defeating the PUK. The United States issued warnings to Saddam Hussein not to drive one faction from Irbil and install its Kurdish allies because it posed a "clear and present danger" to neighboring countries and the flow of oil in the region.<sup>288</sup> There were reports that Saddam's troops were attacking, arresting and executing Kurdish civilians all in violation of Resolution 688.<sup>289</sup> By early September 1996, Saddam Hussein's military had taken over Irbil and 45,000 troops and 300 tanks had moved into the area.<sup>290</sup>

On September 3, 1996, 44 unmanned cruise missiles launched from US B-52 bombers and Navy vessels attacked Iraqi anti-aircraft installations in southern Iraq.<sup>291</sup> Later, the US launched 17 additional cruise missiles at Iraqi air defense sites because critical sites were not destroyed in the initial raid.

## 2. Legal Analysis

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<sup>288</sup> *A Measured Response to Iraq*, N.Y. TIMES, SEPT. 4, 1996, AT A20.

<sup>289</sup> *Id.*

<sup>290</sup> *US Raids Iraq for Second Time*, THE BALTIMORE SUN, Sept. 4, 1996, at 1A.

<sup>291</sup> *See supra* note 288. (praising the choice of targets for protecting civilians and being proportional).

Applying the same model as in the 1986 and 1993 analysis shows that the 1996 air strikes against Iraq really are the dual purpose reprisal in that they are intended to serve as deterrents as well as retribution for violating Resolution 688.

(1) Has there been a violation of a legal obligation or international law? The United States cited a violation of Resolution 688 for the action. Resolution 688 prohibited the repression of the Kurds within Iraq. Defense Secretary William Perry stated "The issue is not simply the Iraqi attack on Irbil, it is the clear and present danger Saddam Hussein poses to its neighbors, to the security and stability of the region, and to the flow of oil in the world."<sup>292</sup> This is clearly an extension of justification under the 1980 Carter Doctrine. In January 1980 President Jimmy Carter proclaimed that the oil supplies in the Persian Gulf were vital American interests and any attempt "by an outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America. And such an assault will be repelled by any means necessary, including military force."<sup>293</sup>

The US attack was justified not only as humanitarian defense of the Kurds in accordance with Resolution 688, but also the defense of oil, a national vital interest. President Clinton

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<sup>292</sup> *Id.*

<sup>293</sup> BOB WOODWARD, THE COMMANDERS 230. (1991) (referring to the 1980 State of the Union Address by President Jimmy Carter).

states that the US policy of using force is justified "when our interest in the security of our friends and allies is threatened..."<sup>294</sup>

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<sup>294</sup> See President William Clinton, *Containing Iraqi Aggression: The US Response*, 1996 US DEPARTMENT OF STATES DISPATCH, Vol. 07, No. 36, Statement from the Oval Office, Washington DC 3 Sept. 1996.

Three days ago, despite clear warnings from the United States and the international community, Iraqi forces attacked and seized the Kurdish-controlled city of Irbil in northern Iraq. The limited withdrawals announced by Iraq do not change the reality; Saddam Hussein's army today controls Irbil, and Iraq units remain deployed for further attacks. These acts demand a strong response, and they have received one. Earlier today, I ordered American forces to strike Iraq. Our missiles sent the following message to Saddam Hussein: When you abuse your own people or threaten your neighbors, you must pay a price. It appears that one Kurdish group which in the past opposed Saddam now has decided to cooperate with him. But that cannot justify unleashing the Iraqi army against the civilian population of Irbil. Repeatedly over the past weeks and months we have worked to secure a lasting cease fire between the Kurdish factions. The Iraqi attack adds fuel to the factional fire and threatens to spark instability throughout the region. Our objectives are limited but clear; to make Saddam pay a price for the latest act of brutality, reducing his ability to threaten his neighbors and America's interests. First, we are extending the no-fly zone in southern Iraq. This will deny Saddam control of Iraqi air space from the Kuwaiti border to the southern suburbs of Baghdad, and will significantly restrict Iraq's ability to conduct offensive operations in the region. Second, to protect the safety of our aircraft enforcing this fly zone, our cruise missiles struck Saddam's air defense capabilities in southern Iraq. The United States was a co-sponsor of United Nations Security resolution 986 which allows Iraq to sell amounts of oil to purchase food and medicine for its people, including the Kurds. Irbil, the city seized by the Iraqis, is a key distribution center for this aid. Until we are sure these humanitarian supplies can actually get to those who need them, the plan cannot go forward and the Iraqi Government will be denied the new resources it has been expecting. Saddam Hussein's objectives may change, but his methods are always the same-- violence and aggression--against the Kurds, against other ethnic minorities, against Iraq's neighbors. Our answer to that recklessness must be strong and immediate, as President Bush demonstrated in Operation Desert Storm, as we showed two years ago when Iraq massed its forces on Kuwait's border, and as we no- showed again today. We must make it clear that reckless acts have consequences, or those acts will increase. We must reduce Iraq's ability to strike out at its neighbors, and we must increase America's ability to contain Iraq over the long run. The steps

(2) Has there been an attempt at pacific redress or was the force necessary? The United States issued repeated public warnings to Iraq.<sup>295</sup> Despite the Article 51 requirement that international disputes be submitted to the Security Council, the United States acted unilaterally in this case as in the 1993 strike against Iraq.

(3) Was the use of force by the United States proportionate to the injury? The strikes were aimed at the Iraqi air defense system in southern Iraq. They were aimed appropriately at military targets and not populated civilian centers. The use of precision weapons minimized collateral damage and there were no civilian casualties. Thus, the response was proportionate to the aggressive action by Iraq. The US adhered to the rule of discrimination in targeting.

(4) Was the reactionary force reported to the international community? The US actions were not approved by the UN Security Council prior to the strikes but were reported after.

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we are taking today will further all of those objectives. Time and again, Saddam Hussein has made clear his disdain for civilized behavior. He brutalized his own people, attacked his neighbors, supported terrorism, and sought to acquire weapons of mass destruction. Our policy is equally clear; When our interest in the security of our friends and allies is threatened, we will act with force if necessary. That is what we did this morning in Iraq. I know the thoughts and prayers of all Americans are with our military men and women who are conducting this mission. God bless them and the nation they are serving.

<sup>295</sup> *Id.*

(5) What was the purpose or intent of the action? While the United States asserted defense of a vital national interest as its justification under Article 51, the rhetoric justifying the strikes support a retributive intent more than one of self-defense. The actions taken in this situation are very clearly a reprisal for the unacceptable behavior of Saddam Hussein. This was the largest US military action against Saddam Hussein since the 1993 missile strike in response to the assassination attempt on former President George Bush. This has unequivocally been called a reprisal action by President Clinton. President Clinton repeatedly states that Saddam must "pay the price" for his actions, and that "reckless acts have consequences, or those acts will increase."<sup>296</sup> The justification for the attack on Iraq given by President Clinton was that Iraq "abused its own people and threatened its neighbors" and for this they must "pay a price."<sup>297</sup> Another reason for the US attack was to restrict Iraq's "ability to conduct offensive operations."<sup>298</sup>

(6) Moral justification? There is moral justification in this use of force. When societal order is threatened then use of force is justified. Thomist interpretation would insist that the evil intent of the attacker justifies a retributive response. Clearly the United States is justified in intervening to prevent genocide of innocent Kurdish civilians.

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

The 1996 attack on Iraq did not go totally uncriticised. Former UN Secretary General Javier de Cuellar condemned the US action. He said that the US resolution "only gave the United States a mandate to protect the Kurds in Iraq, not to carry out reprisal attacks."<sup>299</sup> Javier de Cuellar said that the UN resolution did not permit armed intervention in internal Iraqi matters. However, almost all news accounts of the attack on Iraq characterize this action as one of reprisal and being justified in punishing Saddam for his treatment of the Kurds in northern Iraq.<sup>300</sup> The US has come under criticism because the air strikes were not in the northern part of Iraq where the maltreatment and expulsion of the Kurds was happening. Rather it was command and control centers in the south that US missiles attacked.<sup>301</sup>

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<sup>299</sup> *Former U.N. Head Condemns US Attacks on Iraq*, Reuters, North America Wire, September 4, 1996, Lima Peru.

<sup>300</sup> Rupert Cornwell, *Clinton: We must make it Clear there are Consequences*, THE INDEPENDENT, SEPT. 4, 1996, at 8. In explaining the US attack on Iraq, Clinton said that Iraq had "defied plain warnings from the US and the international community." Washington had acted with limited but clear objectives: "to make Saddam pay a price for his latest brutality and increase America's ability to contain Iraq over the long run." As in almost all other news accounts of the attack, this story characterizes US actions as a reprisal intended to punish Saddam Hussein. See also Charles Miller, *US Planning Iraq Reprisal Strike*, The Press Association Newsfile, 11 September 1996 ; See Charles A. Kupchan, *Containing a Rouge States*, L.A TIMES, Sept. 8, 1996, at 1. This entire story applauds the action against Saddam Hussein by the Clinton administration in retaliation for his misdeeds. "The absence of broader support from allies was unfortunate, but Clinton was justified in proceeding with the retaliatory attack on his own. Indeed, if Clinton deserves any criticism, it is for not having responded with more potent military force." Clintons actions are characterized as a continuation of President Bush's "coercive diplomacy" and Clinton is "helping adapt US policy and the country's military establishment to the challenges posed by rouge states."

<sup>301</sup> *Id.*

## VIII. Conclusion

Unilateral actions taken by a state in response to terrorism should be judged according to proportionality, necessity, discrimination and intent. Self-help measures should not be limited to self-defense or requiring states to go through the legal contortions in order to portray an action as self-defense when it is really a reprisal.

It is clear that there has been a steady erosion of the restraint on the use of reprisal embodied in Article 51. In summary, reprisal actions should be analyzed the same as actions termed self-defense because (1) the response to the triggering event is temporally coexistent rendering them both self-help measures with similar characteristics, and; (2) recent US actions have been justified with multiple purposes, to include deterrence and retribution. Global acquiescence to these justifications has elevated this practice to that of customary international law. There is no longer a need to articulate a difference between the intentions of the two actions. Thus, both actions deserve legal legitimacy as measures against terrorism. Justification for actions now can be grounded in deterrence as well as retribution. Because the recent actions have gone virtually unchallenged, there is basis in state practice for giving Article 51 a broader interpretation, or possibly for the further development of customary international law to supplement Article 51.

The right of retaliation has assumed the character of a preemptory norm. It has been suggested that the questions raised as to the use of reprisals cannot be settled in the international legal community until several events occur: (1) the international community



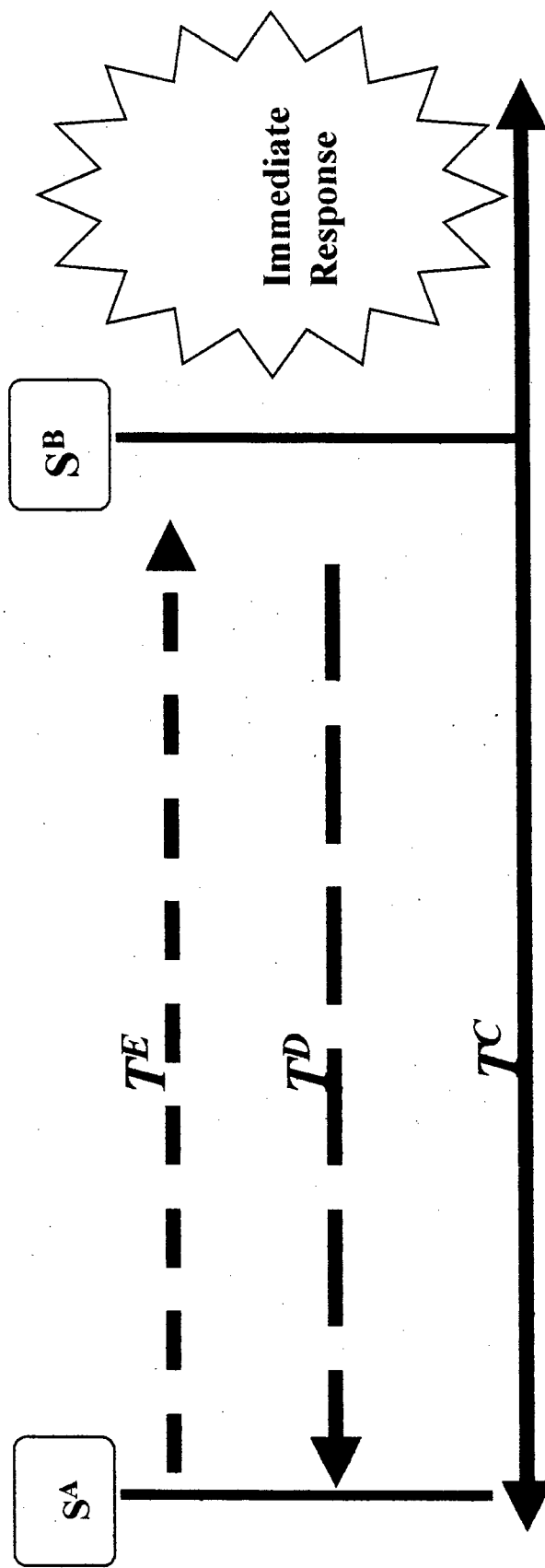
must resolve to settle disputes before they turn into armed conflicts; (2) arms dealing and trading is reduced to the extent that this practice does not become the cause of international conflicts; (3) devise verifiable, effective, international controls on the production of nuclear and chemical weapons; (4) in the event armed conflict does occur, devise a system whereby violators of international law will be brought to a collective trial and if convicted, are appropriately punished.<sup>302</sup> For the moment, it would seem the world is not ready to make these adjustments. Until then, Article 51 of the UN Charter should be reconsidered to include the legitimate acts of reprisal which adhere to traditional moral principles and customary international law. Reprisals provide an appropriate level of military action in some instances, especially combating terrorism. As mentioned earlier, it is a measure "short of war" that does not subject entire populations to the horrors of total war. It is more important to define the limits of reprisals, then to condemn their use altogether. In light of the recent US actions against Iraq, it would seem that reprisals have become a tool of foreign policy. The US should propose to amend Article 51 and give reprisals the same international legal legitimacy as self-defense.

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<sup>302</sup> Best, *supra* note 1, at 393. Best concedes that without an effective and strong policing system "which can be relied upon to bring accused persons to justice" the global community will not be able to regulate violators with any consistency.

# **APPENDIX A**

# Traditional Self-Defense Model



$S^A$  = Aggressor State/Terrorist Group

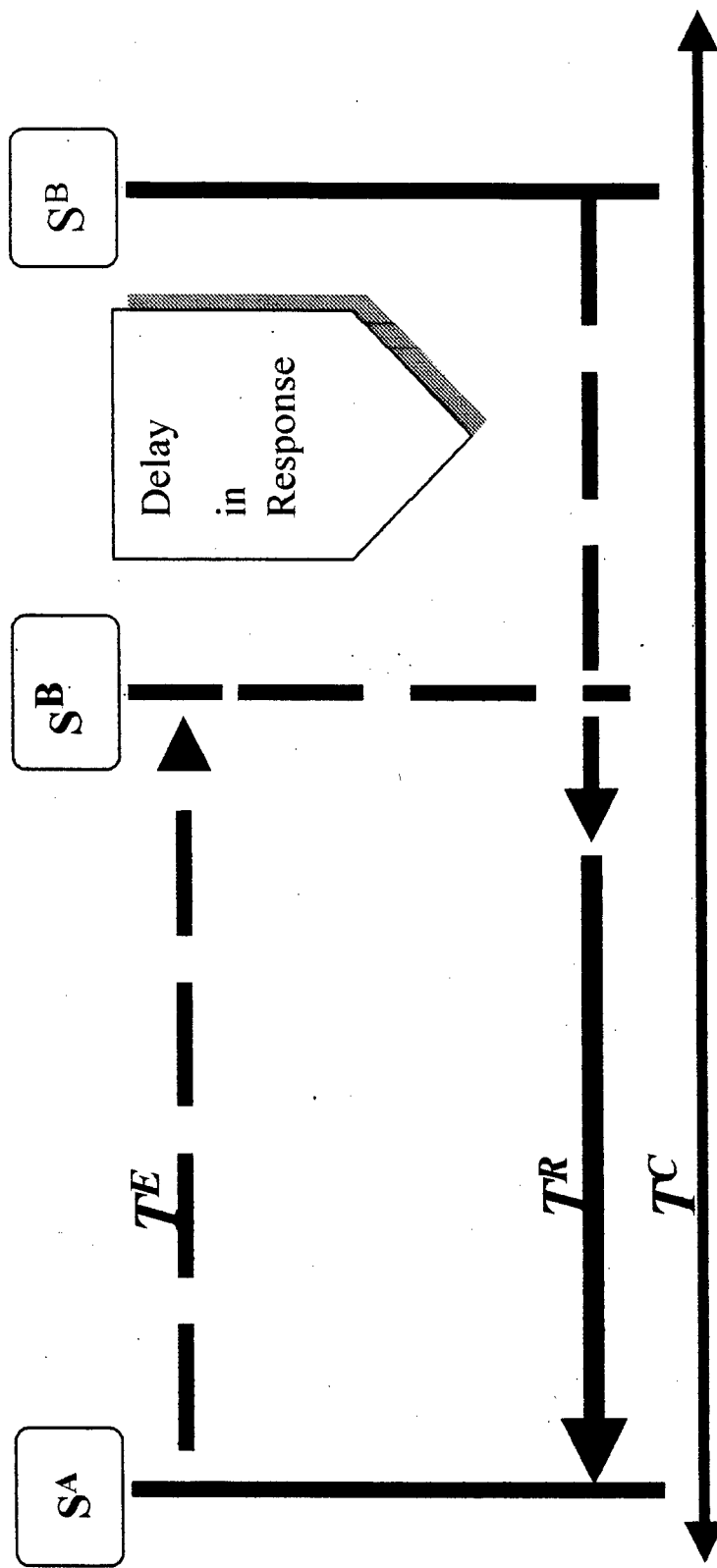
$S^B$  = Victim State

$T^C$  = Time Continuum

$T^E$  = Triggering Events/Act of Terrorism

$T^D$  = Response with Deterrent Intent

# Traditional Reprisal Model



$S^A$ = Aggressor State/Terrorist Group

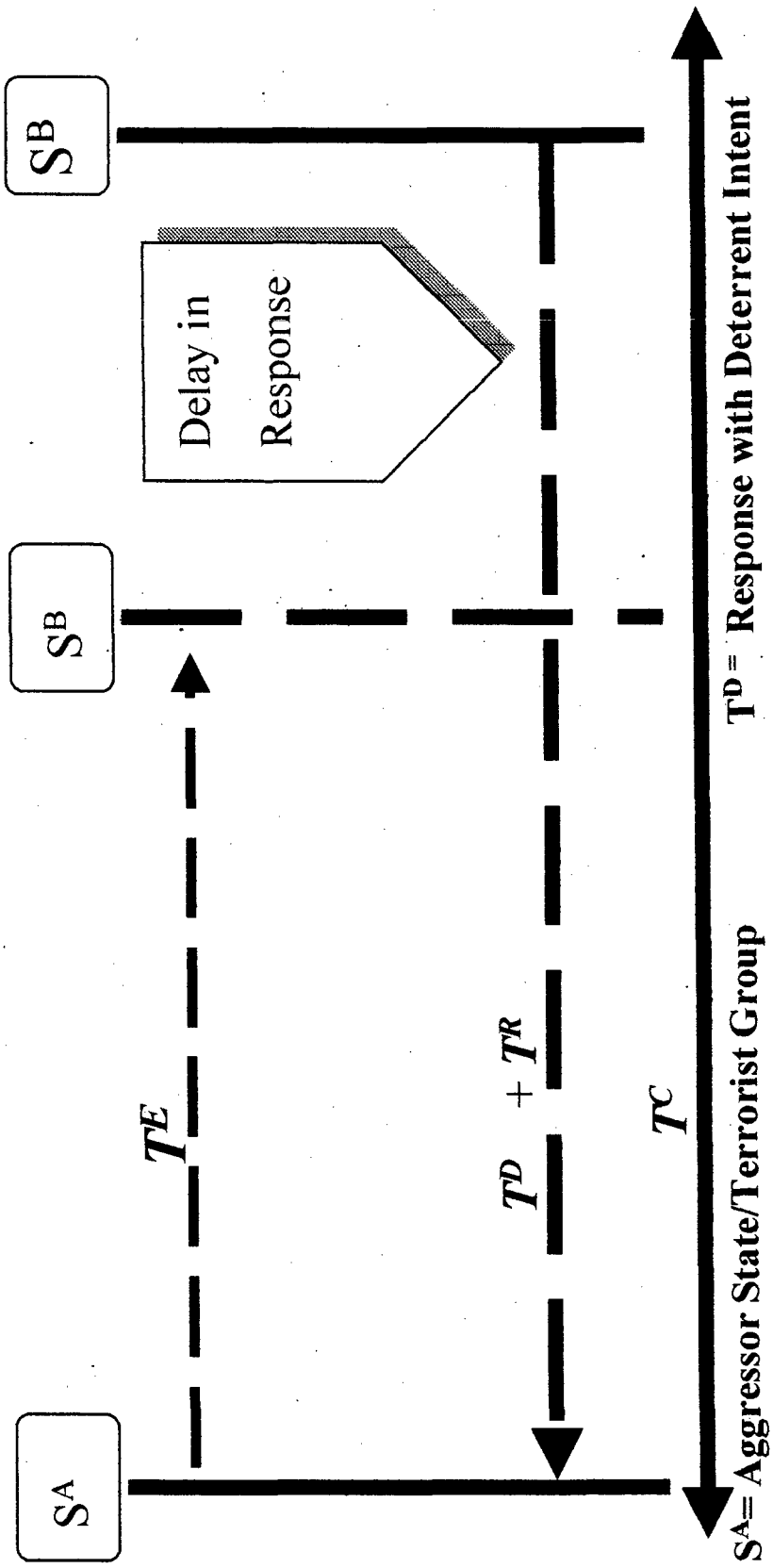
$S^B$ = Victim State

$T^C$ = Time Continuum

$T^E$ = Triggering Event/Act of Terrorism

$T^R$  = Response with Retributive Intent

# Proposed Model for Peacetime Reprisal in Response to Terrorism



$S^A$ = Aggressor State/Terrorist Group

$S^B$ = Victim State

$T^C$ = Time Continuum

$T^E$ = Triggering Event/Act of Terrorism

$T^R$  = Response with Retributive Intent

## **APPENDIX B**

S/RES/686 (1991)  
2 March 1991

RESOLUTION 686 (1991)

Adopted by the Security Council at its 2978th meeting on  
2 March 1991

The Security Council,

Recalling and reaffirming its resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990), 677 (1990), and 678 (1990),

Recalling the obligations of Member States under Article 25 of the Charter,

Recalling paragraph 9 of resolution 661 (1990) regarding assistance to the Government of Kuwait and paragraph 3 (c) of that resolution regarding supplies strictly for medical purposes and, in humanitarian circumstances, foodstuffs,

Taking note of the letters of the Foreign Minister of Iraq confirming Iraq's agreement to comply fully with all of the resolutions noted above (S/22275), and stating its intention to release prisoners of war immediately (S/22273),

Taking note of the suspension of offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990),

Bearing in mind the need to be assured of Iraq's peaceful intentions, and the objective in resolution 678 (1990) of restoring international peace and security in the region,

Underlining the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities,

Affirming the commitment of all Member States to the independence, sovereignty and territorial integrity of Iraq and Kuwait, and noting the intention expressed by the Member States cooperating under paragraph 2 of Security Council resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with achieving the objectives of the resolution,

Acting under Chapter VII of the Charter,

1. Affirms that all twelve resolutions noted above continue to have full force and effect;
2. Demands that Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq:
  - (a) Rescind immediately its actions purporting to annex Kuwait;

(b) Accept in principle its liability for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;

(c) Under international law immediately release under the auspices of the International Committee of the Red Cross, Red Cross Societies, or Red Crescent Societies, all Kuwaiti and third country nationals detained by Iraq and return the remains of any deceased Kuwaiti and third country nationals so detained; and

(d) Immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period;

3. Further demands that Iraq:

(a) Cease hostile or provocative actions by its forces against all Member States including missile attacks and flights of combat aircraft;

(b) Designate military commanders to meet with counterparts from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities at the earliest possible time;

(c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990); and

(d) Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in adjacent waters;

4. Recognizes that during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid;

5. Welcomes the decision of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to provide access and to commence immediately the release of Iraqi prisoners of war as required by the terms of the Third Geneva Convention of 1949, under the auspices of the International Committee of the Red Cross;

6. Requests all Member States, as well as the United Nations, the specialized agencies and other international organizations in the United Nations system, to take all appropriate action to cooperate with the Government and people of Kuwait in the reconstruction of their country;

7. Decides that Iraq shall notify the Secretary-General and the Security Council when it has taken the actions set out above;

8. Decides that in order to secure the rapid establishment of a



definitive end to the hostilities, the Security Council remains actively seized of the matter.

S/RES/688 (1991)  
5 April 1991

RESOLUTION 688 (1991)

Adopted by the Security Council at its 2982nd meeting on  
5 April 1991

The Security Council,

Mindful of its duties and its responsibilities under the Charter of the United Nations for the maintenance of international peace and security,

Recalling of Article 2, paragraph 7, of the Charter of the United Nations,

Gravely concerned by the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions, which threaten international peace and security in the region,

Deeply disturbed by the magnitude of the human suffering involved,

Taking note of the letters sent by the representatives of Turkey and France to the United Nations dated 2 April 1991 and 4 April 1991, respectively (S/22435 and S/22442),

Taking note also of the letters sent by the Permanent Representative of the Islamic Republic of Iran to the United Nations dated 3 and 4 April 1991, respectively (S/22436 and S/22447),

Reaffirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Iraq and of all States in the area,

Bearing in mind the Secretary-General's report of 20 March 1991 (S/22366),

1. Condemns the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which threaten international peace and security in the region;
2. Demands that Iraq, as a contribution to remove the threat to international peace and security in the region, immediately end this repression and express the hope in the same context that an open dialogue will take place to ensure that the human and political rights of all Iraqi citizens are respected;
3. Insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations;

4. Requests the Secretary-General to pursue his humanitarian efforts in Iraq and to report forthwith, if appropriate on the basis of a further mission to the region, on the plight of the Iraqi civilian population, and in particular the Kurdish population, suffering from the repression in all its forms inflicted by the Iraqi authorities;

5. Requests further the Secretary-General to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population;

6. Appeals to all Member States and to all humanitarian organizations to contribute to these humanitarian relief efforts;

7. Demands that Iraq cooperate with the Secretary-General to these ends;

8. Decides to remain seized of the matter.

## **APPENDIX C**

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

June 26, 1993

REMARKS BY THE PRESIDENT  
IN ADDRESS TO THE NATION

The Oval Office

7:40 P.M. EDT

THE PRESIDENT: My fellow Americans, this evening I want to speak with you about an attack by the government of Iraq against the United States, and the actions we have just taken to respond.

This past April, the Kuwaiti government uncovered what they suspected was a car bombing plot to assassinate former President George Bush while he was visiting Kuwait City. The Kuwaiti authorities arrested 16 suspects, including two Iraq nationals. Following those arrests, I ordered our own intelligence and law enforcement agencies to conduct a thorough and independent investigation. Over the past several weeks, officials from those agencies reviewed a range of intelligence information, traveled to Kuwait and elsewhere, extensively interviewed the suspects, and thoroughly examined the forensic evidence.

This Thursday, Attorney General Reno and Director of Central Intelligence Woolsey gave me their findings. Based on their investigation there is compelling evidence that there was, in fact, a plot to assassinate former President Bush; and that this plot, which included the use of a powerful bomb made in Iraq, was directed and pursued by the Iraqi Intelligence Service.

We should not be surprised by such deeds, coming as they do from a regime like Saddam Hussein's, which is ruled by atrocity, slaughtered its own people, invaded two neighbors, attacked others, and engaged in chemical and environmental warfare. Saddam has repeatedly violated the will and conscience of the international community.

But this attempt at revenge by a tyrant against the leader of the world coalition that defeated him in war is particularly loathsome and cowardly. We thank God it was unsuccessful.

The authorities who foiled it have the appreciation of all Americans. It is clear that this was no impulsive or random act. It was an elaborate plan devised by the Iraqi government and directed against a former President of the United States because of actions he took as President. As such, the Iraqi attack against President Bush was an attack against our country and against all Americans.

We could not and have not let such action against our nation go unanswered.

From the first days of our revolution, America's security has depended on the clarity of this message: Don't tread on us. A firm and commensurate response was essential to protect our sovereignty; to send a message to those who engage in state-sponsored terrorism; to deter further violence against our people; and to affirm the expectation of civilized behavior among nations.

Therefore, on Friday, I ordered our forces to launch a

cruise missile attack on the Iraqi Intelligence Service's principal command and control facility in Baghdad. Those missiles were launched this afternoon at 4:22 p.m. Eastern Daylight Time. They landed approximately an hour ago. I have discussed this action with the congressional leadership and with our allies and friends in the region. And I have called for an emergency meeting of the United Nations Security Council to expose Iraq's crime.

These actions were directed against the Iraqi government, which was responsible for the assassination plot. Saddam Hussein has demonstrated repeatedly that he will resort to terrorism or aggression if left unchecked. Our intent was to target Iraq's capacity to support violence against the United States and other nations, and to deter Saddam Hussein from supporting such outlaw behavior in the future. Therefore, we directed our action against the facility associated with Iraq's support of terrorism, while making every effort to minimize the loss of innocent life.

There should be no mistake about the message we intend these actions to convey to Saddam Hussein, to the rest of the Iraqi leadership, and to any nation, group, or person who would harm our leaders or our citizens. We will combat terrorism. We will deter aggression. We will protect our people.

The world has repeatedly made clear what Iraq must do to return to the community of nations. And Iraq has repeatedly refused. If Saddam and his regime contemplate further illegal provocative actions they can be certain of our response.

Let me say to the men and women in our Armed Forces and in our intelligence and law enforcement agencies who carried out the investigation and our military response: You have my gratitude and the gratitude of all Americans. You have performed a difficult mission with courage and professionalism.

Finally, I want to say this to all the American people: While the Cold War has ended, the world is not free of danger. And I am determined to take the steps necessary to keep our nation secure. We will keep our forces ready to fight. We will work to head off emerging threats and we will take action when action is required. That is precisely what we have done today.

Thank you, and God bless America.

END7:45 P.M. EDT